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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2020–0780; Product Identifier 2020–NM–103–AD; Amendment 39–21342; AD 2020–24–12]

RIN 2120–AA64

#### Airworthiness Directives; Airbus SAS Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A350–941 airplanes. This AD was prompted by reports that certain central wing box (CWB) fasteners had rotated inside the fastener holes due to insufficient friction for the application. This AD requires replacement of the affected fasteners, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 5, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 5, 2021.

**ADDRESSES:** For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this

IBR material on the EASA website at <https://ad.easa.europa.eu>. You may view this IBR material at the FAA, 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–2020–0780.

#### 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–2020–0780; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email [kathleen.arrigotti@faa.gov](mailto:kathleen.arrigotti@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0123, dated May 29, 2020 (EASA AD 2020–0123) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus SAS Model A350–941 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A350–941 airplanes. The NPRM published in the **Federal Register** on

August 25, 2020 (85 FR 52284). The NPRM was prompted by reports that certain CWB fasteners had rotated inside the fastener holes due to insufficient friction for the application. The NPRM proposed to require replacement of the affected fasteners, as specified in an EASA AD.

The FAA is issuing this AD to address CWB fastener rotation. This condition, if not corrected, could lead to cracking of the fastener head sealant cover, followed by fuel vapor leakage inside the cabin, possibly resulting in injury to airplane occupants. See the MCAI for additional background information.

#### Comments

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

#### Conclusion

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

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

#### Related Service Information Under 14 CFR Part 51

EASA AD 2020–0123 describes procedures for replacement of the affected CWB fasteners with fasteners having improved friction efficiency. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

#### Costs of Compliance

The FAA estimates that this AD affects 13 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

#### ESTIMATED COSTS FOR REQUIRED ACTIONS

| Labor cost                                      | Parts cost | Cost per product | Cost on U.S. operators |
|-------------------------------------------------|------------|------------------|------------------------|
| 307 work-hours × \$85 per hour = \$26,095 ..... | \$5,900    | \$31,995         | \$415,935              |



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

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

**2020–24–12 Airbus SAS:** Amendment 39–21342; Docket No. FAA–2020–0780; Product Identifier 2020–NM–103–AD.

#### (a) Effective Date

This airworthiness directive (AD) is effective January 5, 2021.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to Airbus SAS Model A350–941 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–0123, dated May 29, 2020 ("EASA AD 2020–0123").

#### (d) Subject

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

#### (e) Reason

This AD was prompted by reports that certain central wing box (CWB) fasteners had rotated inside the fastener holes due to insufficient friction for the application. The FAA is issuing this AD to address CWB fastener rotation. This condition, if not corrected, could lead to cracking of the fastener head sealant cover, followed by fuel vapor leakage inside the cabin, possibly resulting in injury to airplane occupants.

#### (f) Compliance

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

#### (g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0123.

#### (h) Exception to EASA AD 2020–0123

The "Remarks" section of EASA AD 2020–0123 does not apply to this AD.

#### (i) Other FAA AD Provisions

The following provisions also apply to this AD:

- (1) *Alternative Methods of Compliance (AMOCs):* The Manager, 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 responsible Flight Standards 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 (j) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

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

#### (j) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email [kathleen.arrigotti@faa.gov](mailto:kathleen.arrigotti@faa.gov).

#### (k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0123, dated May 29, 2020.

(ii) [Reserved]

(3) For AD 2020–0123, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>.

(4) You may view this material at the FAA, 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–2020–0780.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration

(NARA). For information on the availability of this material at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov), or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued on November 20, 2020.

**Lance T. Gant,**

*Director, Compliance & Airworthiness  
Division, Aircraft Certification Service.*

[FR Doc. 2020–26436 Filed 11–30–20; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2019–0484; Product Identifier 2020–NM–051–AD; Amendment 39–21341; AD 2020–24–11]

**RIN 2120–AA64**

#### Airworthiness Directives; Airbus SAS Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–200, A330–200 Freighter, A330–300, A340–200, A340–300, A340–500, and A340–600 series airplanes. This AD was prompted by a report that an airplane failed to extend its nose landing gear (NLG) using the free fall method, due to loss of the green hydraulic system. This AD requires repetitive tests of affected free fall actuators (FFA), and replacement of any affected FFA with a serviceable FFA, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 5, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 5, 2021.

**ADDRESSES:** For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email [ADS@easa.europa.eu](mailto:ADS@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this IBR material on the EASA website at <https://ad.easa.europa.eu>. You may view this IBR material at the FAA, 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–2019–0484.

#### Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0484; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

#### FOR FURTHER INFORMATION CONTACT:

Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email [vladimir.ulyanov@faa.gov](mailto:vladimir.ulyanov@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0076, dated March 30, 2020 (“EASA AD 2020–0076”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for all Airbus SAS Model A330–200, A330–200 Freighter, A330–300, A340–200, and A340–300 series airplanes; Model A340–541 and –542 airplanes; and Model A340–642 and –643 airplanes. Airbus SAS Model A340–542 and A340–643 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus SAS Model A330–200, A330–200 Freighter, A330–300, A340–200, A340–300, A340–500, and A340–600 series airplanes. The NPRM published in the **Federal Register** on June 30, 2020 (85 FR 39110). The NPRM was prompted by a report that an airplane failed to extend its NLG using the free fall method, due to loss of the green hydraulic system. The NPRM proposed to require repetitive tests of affected FFAs, and replacement of any

affected FFA with a serviceable FFA, as specified in an EASA AD.

The FAA is issuing this AD to address detached magnets on both electrical motors of the FFAs, which could prevent landing gear extension by the free fall method, possibly resulting in loss of control of the airplane after landing. See the MCAI for additional background information.

#### Comments

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

#### Support for the NPRM

The Air Line Pilots Association, International (ALPA) and American Airlines expressed support for the proposed AD.

#### Request To Supersede AD 98–03–03

American Airlines recommended that the proposed AD supersede AD 98–03–03, Amendment 39–10295 (63 FR 4374, January 29, 1998) (AD 98–03–03). The commenter asserted that Appendix 4 of Airbus All Operators Transmission (AOT) 32L012–18, Revision 01, dated May 16, 2019; Revision 02, dated July 3, 2019; and Revision 03, dated January 21, 2020; includes FFA serial numbers that were the subject of AD 98–03–03. The commenter also pointed out that the specific serial numbers impacted by AD 98–03–03 are shown in Lucas Aerospace Alert Service Bulletin AR024–A32–001, dated July 28, 1995, which was referenced as an additional source of service information in AD 98–03–03.

The FAA does not agree to supersede AD 98–03–03, which affects, in part, Model A330 series airplanes, as listed in Airbus Service Bulletin A330–32–3042, Revision 1, dated September 19, 1995. That service bulletin lists Model A330–301, –321, –322, and –342 series airplanes with specific manufacturer serial numbers (MSNs). None of those airplanes are registered in the U.S. This AD affects all Model A330–200 and A330–300 series airplanes, including all MSNs. In addition, AD 98–03–03 affects FFAs with part numbers (P/Ns) AR02403, AR02404, and AR02405, while this AD affects FFAs with P/N AR02404 only. AD 98–03–03 also addresses a different unsafe condition than is addressed in this AD. For these reasons, the FAA has determined that it is inappropriate for this AD to supersede AD 98–03–03. The FAA has not changed this AD with regard to this request.

**Conclusion**

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

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and

- Do not add any additional burden upon the public than was already proposed in the NPRM.

**Related Service Information Under 1 CFR Part 51**

EASA AD 2020–0076 describes procedures for repetitive tests of affected FFAs and replacement of any affected FFA that fails a test with a serviceable FFA. EASA AD 2020–0076 also describes procedures for replacement of all affected FFAs, which

terminates the repetitive tests. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

**Costs of Compliance**

The FAA estimates that this AD affects 113 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

**ESTIMATED COSTS FOR REQUIRED ACTIONS**

| Labor cost                                 | Parts cost | Cost per product | Cost on U.S. operators |
|--------------------------------------------|------------|------------------|------------------------|
| 4 work-hours × \$85 per hour = \$340 ..... | *\$0       | \$340            | \$38,420               |

\*The FAA has received no definitive data that would enable the agency to provide parts cost estimates for the replacements specified in this AD.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on

the results of any required actions. The FAA has no way of determining the

number of aircraft that might need these on-condition actions:

**ESTIMATED COSTS OF ON-CONDITION ACTIONS**

| Labor cost                                 | Parts cost | Cost per product |
|--------------------------------------------|------------|------------------|
| 2 work-hours × \$85 per hour = \$170 ..... | *\$0       | \$170            |

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

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the

distribution of power and responsibilities among the various levels of government.

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

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

**Adoption of the Amendment**

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

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

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

**2020–24–11 Airbus SAS:** Amendment 39–21341; Docket No. FAA–2019–0484; Product Identifier 2020–NM–051–AD.

**(a) Effective Date**

This AD is effective January 5, 2021.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all Airbus SAS airplanes identified in paragraphs (c)(1) through (7) of this AD, certificated in any category.

- (1) Model A330–201, –202, –203, –223, and –243 airplanes.
- (2) Model A330–223F and –243F airplanes.
- (3) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.
- (4) Model A340–211, –212, –213 airplanes.
- (5) Model A340–311, –312, and –313 airplanes.
- (6) Model A340–541 airplanes.
- (7) Model A340–642 airplanes.

**(d) Subject**

Air Transport Association (ATA) of America Code 32, Landing gear.

**(e) Reason**

This AD was prompted by a report that an airplane failed to extend its nose landing gear (NLG) using the free fall method, due to loss of the green hydraulic system. The FAA is issuing this AD to address detached magnets on both electrical motors of the free fall actuators (FFAs), which could prevent landing gear extension by the free fall method, possibly resulting in loss of control of the airplane after landing.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020-0076, dated March 30, 2020 ("EASA AD 2020-0076").

**(h) Exceptions to EASA AD 2020-0076**

(1) Where EASA AD 2020-0076 refers to its effective date or "the effective date of EASA AD 2019-0063" or "the effective date of EASA AD 2019-0164," this AD requires using the effective date of this AD.

(2) The "Remarks" section of EASA AD 2020-0076 does not apply to this AD.

(3) Where paragraph (3) of EASA AD 2020-0076 specifies credit for certain tasks "provided the continuity test specified in A330 AMM [Aircraft Maintenance Manual] task 32-33-00-710-809, or A340 AMM task 32-33-00-710-806, as applicable, is accomplished concurrently," this AD provides credit "provided the continuity test is accomplished concurrently in accordance with the instructions of an FAA-approved maintenance or inspection program."

**(i) No Reporting Requirement**

Although the service information referenced in EASA AD 2020-0076 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

**(j) 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 responsible Flight Standards 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 (k) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain instructions

from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC)*: For any service information referenced in EASA AD 2020-0076 that contains RC procedures and tests: Except as required by paragraphs (h)(3) and (j)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

**(k) Related Information**

For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3229; email [vladimir.ulyanov@faa.gov](mailto:vladimir.ulyanov@faa.gov).

**(l) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020-0076, dated March 30, 2020.

(ii) [Reserved]

(3) For EASA AD 2020-0076, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); Internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>.

(4) You may view this material at the FAA, 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-2019-0484.

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

Issued on November 18, 2020.

**Lance T. Gant,**

*Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2020-26435 Filed 11-30-20; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

**[Docket No. FAA-2020-0712; Product Identifier 2019-CE-013-AD; Amendment 39-21339; AD 2020-24-09]**

**RIN 2120-AA64**

**Airworthiness Directives; Piper Aircraft, Inc. Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Piper Aircraft, Inc., Model PA-34-220T airplanes. This AD was prompted by a report of damage to the rudder flight control cables and the emergency power supply (EPS) system wiring due to inadequate clearance from the EPS wiring harness. This AD requires inspecting the rudder flight control cables and the EPS wiring for damage, replacing damaged cables and wires if necessary, and re-routing the EPS wiring harness to ensure proper clearance between the EPS and the rudder flight control cables. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 5, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 5, 2021.

**ADDRESSES:** Piper Aircraft, Inc., 2916 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567-4361; email: [customer.service@piper.com](mailto:customer.service@piper.com); internet: <https://www.piper.com>. You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

**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-2020-0712; or in person at Docket Operations

between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:**  
Bryan Long, Aerospace Engineer,  
Atlanta ACO Branch, FAA, 1701  
Columbia Avenue, College Park, Georgia  
30337; phone: (404) 474-5578; fax: (404)  
474-5606; email: [bryan.long@faa.gov](mailto:bryan.long@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Piper Aircraft, Inc., Model PA-34-220T airplanes. The NPRM published in the **Federal Register** on July 28, 2020 (85 FR 45353). The NPRM was prompted by a report of damage to the rudder flight control cables and the EPS system wiring due to inadequate clearance from the EPS wiring harness. Use of the

rudder flight control cable and the motion of the cable rubbing against the EPS wiring can wear through the rudder flight control cable insulation and cause an electrical path to ground. The flow of the electrical current can burn (arc) through the rudder flight control cable strands, eventually severing the rudder flight control cable. In the NPRM, the FAA proposed to require inspecting the rudder flight control cables and the EPS wiring for damage, replacing damaged cables and wires if necessary, and re-routing the EPS wiring harness to ensure proper clearance between the EPS and the rudder flight control cables.

This condition, if not addressed, could result in electrical arcing between the EPS and the rudder flight control cables with consequent failure of the rudder flight control system. This failure could cause loss of yaw control and lead to loss of control of the airplane during an engine out condition/operation. The FAA is issuing this AD to address the unsafe condition on these products.

##### Comments

The FAA received no comments on the NPRM or on the determination of the costs.

##### Conclusion

The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed in the NPRM. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products.

##### Related Service Information Under 1 CFR Part 51

The FAA reviewed Piper Aircraft, Inc., Service Bulletin No. 1337, dated February 15, 2019. The service bulletin contains procedures for inspecting the rudder flight control cables and the EPS wiring for damage, replacing damaged cables and wires, and re-routing the EPS wiring harness to the opposite side of the EPS bracket to improve clearance from the rudder flight control cable. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

##### Costs of Compliance

The FAA estimates that this AD affects 25 airplanes of U.S. registry.

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

##### ESTIMATED COSTS

| Action                                                       | Labor cost                                 | Parts cost     | Cost per product | Cost on U.S. operators |
|--------------------------------------------------------------|--------------------------------------------|----------------|------------------|------------------------|
| Inspect the rudder flight control cables and the EPS wiring. | 1 work-hour × \$85 per hour = \$85 .....   | Not applicable | \$85             | \$2,125                |
| Re-routing the EPS wiring harness .....                      | 2 work-hours × \$85 per hour = \$170 ..... | \$100 .....    | 270              | 6,750                  |

The FAA estimates the following costs to do any necessary replacements

that would be required based on the results of the inspection. The FAA has

no way of determining the number of airplanes that might need actions:

##### ON-CONDITION COSTS

| Action                                            | Labor cost                                  | Parts cost | Cost per product |
|---------------------------------------------------|---------------------------------------------|------------|------------------|
| Replace damaged rudder flight control cable ..... | 8 work-hours × \$85 per hour = \$680 .....  | \$157      | \$837            |
| Replace damaged EPS wiring .....                  | 10 work-hours × \$85 per hour = \$850 ..... | 2,770      | 3,620            |

##### 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

This AD will not have federalism implications under Executive Order 13132. This AD will not have a

substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 39

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

### The Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

#### 2020–24–09 Piper Aircraft, Inc.:

Amendment 39–21339; Docket No. FAA–2020–0712; Product Identifier 2019–CE–013–AD.

#### (a) Effective Date

This airworthiness directive (AD) is effective January 5, 2021.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to Piper Aircraft, Inc., Model PA–34–220T airplanes, serial numbers 3449459 and 3449467 through 3449508, certificated in any category.

#### (d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 27. Flight Controls.

#### (e) Unsafe Condition

This AD was prompted by a report of damage to the rudder flight control cables and the emergency power supply (EPS) system wiring due to inadequate clearance from the EPS wiring harness. The FAA is issuing this AD to detect, correct, and prevent damaged rudder flight control cables and EPS system wiring. The unsafe condition, if not addressed, could result in electrical arcing between the EPS and the rudder flight control cables with consequent failure of the rudder flight control system. This failure could cause loss of yaw control and lead to loss of control of the airplane during an engine out condition/operation.

#### (f) Compliance

Unless already done, comply with this AD within 50 hours time-in-service after the effective date of this AD or within 6 months after the effective date of this AD, whichever occurs first.

#### (g) Inspect, Replace, and Relocate

(1) Inspect the rudder flight control cables and the EPS wiring for chafing and damage

by following step 3 of the Instructions in Piper Service Bulletin No. 1337, dated February 15, 2019 (Piper SB No. 1337). If there is any chafing or damage, before further flight, replace the rudder flight control cable and EPS wiring.

(2) Relocate the EPS wiring harness by following steps 4 through 12 of the Instructions in Piper SB No. 1337.

#### (h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i) of this AD.

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

(3) For service information that contains steps that are labeled as Required for Compliance (RC), the following provisions apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

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

#### (i) Related Information

For more information about this AD, contact Bryan Long, Aerospace Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5578; fax: (404) 474–5606; email: [bryan.long@faa.gov](mailto:bryan.long@faa.gov).

#### (j) Material Incorporated by Reference

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

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

(i) Piper Service Bulletin No. 1337, dated February 15, 2019.

(ii) [Reserved]

(3) For the service information identified in this AD, contact Piper Aircraft, Inc., 2916 Piper Drive, Vero Beach, Florida 32960; telephone: (772) 567–4361; email: [customer.service@piper.com](mailto:customer.service@piper.com); internet: <https://www.piper.com>.

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information

on the availability of this material at the FAA, call (816) 329–4148.

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

Issued on November 17, 2020.

**Lance T. Gant,**

*Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2020–26473 Filed 11–30–20; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

[Docket No. FAA–2020–1027; Project Identifier MCAI–2020–01375–R; Amendment 39–21333; AD 2020–24–03]

**RIN 2120–AA64**

### Airworthiness Directives; Airbus Helicopters

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350D, AS355E, AS355F, AS355F1, and AS355F2 helicopters. This AD requires testing the UP/DOWN switches of a certain part-numbered DUNLOP cyclic stick grip, installing a placard, and revising the existing Rotorcraft Flight Manual (RFM) for your helicopter, or removing the DUNLOP cyclic stick grip. This AD was prompted by an inadvertent activation of the rescue hoist cable cutter. The actions of this AD are intended to address an unsafe condition on these products.

**DATES:** This AD becomes effective December 16, 2020.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of December 16, 2020.

The FAA must receive comments on this AD by January 15, 2021.

**ADDRESSES:** You may send comments by any of the following methods:

- **Federal eRulemaking Docket:** Go to <https://www.regulations.gov>. Follow the online instructions for sending your comments electronically.
- **Fax:** 202–493–2251.

- **Mail:** Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

- **Hand Delivery:** Deliver to the “Mail” address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

#### Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2020–1027; 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 AD, the European Union Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at <https://www.airbus.com/helicopters/services/technical-support.html>. You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2020–1027.

**FOR FURTHER INFORMATION CONTACT:** Daniel E. Moore, Aviation Safety Engineer, Regulations & Policy Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email [daniel.e.moore@faa.gov](mailto:daniel.e.moore@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include the docket number FAA–2020–1027 and Project Identifier MCAI–2020–01375–R at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, 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 final rule because of 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 received, without change, to <https://www.regulations.gov>, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

#### 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 AD 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 AD, 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 AD. Submissions containing CBI should be sent to Daniel E. Moore, Aviation Safety Engineer, Regulations & Policy Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email [daniel.e.moore@faa.gov](mailto:daniel.e.moore@faa.gov). Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

#### Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA Emergency AD No. 2020–0217–E, dated October 6, 2020, to correct an unsafe condition for Airbus Helicopters (AH), formerly Eurocopter, Eurocopter France, Aerospatiale, Model AS 350 B, AS 350 BA, AS 350 B1, AS 350 B2, AS 350 D, AS 355 E, AS 355 F, AS 355 F1, and AS 355 F2 helicopters. EASA advises of a report of an unintended release of the rescue hoist hook on a Model AS 350 B2 helicopter during a ground check. The operator was using the UP/DOWN switches for rescue hoist control, installed on DUNLOP cyclic stick grip part number (P/N) AC66444, when the hoist’s electrically-actuated cable cutter function activated. EASA states that this condition, if not corrected, could lead to further events of inadvertent activation of the rescue hoist cable cutter function and consequent detachment of an external load or person from the

helicopter hoist, possibly resulting in personal injury or injury to persons on the ground.

To address this potential unsafe condition, Airbus Helicopters published Emergency Alert Service Bulletin (EASB) Nos. 01.00.58 and 01.00.72, each Revision 0 and dated October 1, 2020, to introduce an operational limitation.

Accordingly, the EASA AD requires installing a dedicated placard in the cockpit and amending the applicable RFM to prohibit the in-flight use of the UP/DOWN switches for rescue hoist control installed on DUNLOP cyclic stick grip P/N AC66444. EASA states its AD is considered an interim action and further AD action may follow.

#### FAA’s Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

#### Related Service Information Under 1 CFR Part 51

The FAA has reviewed Airbus Helicopters EASB No. 01.00.58 for Model AS355-series helicopters and Airbus Helicopters EASB No. 01.00.72 for Model AS350-series helicopters, each Revision 0 and dated October 1, 2020, which are co-published as one document. This service information specifies installing a placard and revising the Flight Manual to prohibit the use of the UP/DOWN switches of the DUNLOP cyclic stick grip manufacturer P/N (MP/N) AC66444.

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

#### AD Requirements

This AD requires accomplishing a ground test of the UP/DOWN switches of DUNLOP cyclic stick grip MP/N AC66444 for proper function before each hoist operation. If there is any uncommanded hoist action, this AD requires removing the DUNLOP cyclic stick grip from service.

If DUNLOP cyclic stick grip MP/N AC66444 is installed, before the next hoist operation, this AD requires installing a placard and revising the existing RFM for your helicopter to prohibit the use of the UP/DOWN



switches of the DUNLOP cyclic stick grip. Alternatively, this AD allows removing DUNLOP cyclic stick grip MP/N AC66444, however before the DUNLOP cyclic stick grip is re-installed, this AD requires accomplishing the ground test of the UP/DOWN switches and installing the placard and revising the existing RFM for your helicopter. This AD also prohibits installing an affected DUNLOP cyclic stick grip unless the ground testing of the UP/DOWN switches has been accomplished, the placard has been installed, and the existing RFM for your helicopter has been revised.

#### **Differences Between This AD and the EASA AD**

The EASA AD applies to all Airbus Helicopters Model AS 350 B, AS 350 BA, AS 350 B1, AS 350 B2, AS 350 D, AS 355 E, AS 355 F, AS 355 F1, and AS 355 F2 helicopters, whereas this AD applies to Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350D, AS355E, AS355F, AS355F1, and AS355F2 helicopters with DUNLOP cyclic stick grip MP/N AC66444 with UP/DOWN switches for rescue hoist control installed instead. This AD requires accomplishing a ground test of the UP/DOWN switches for proper function before each hoist operation, whereas the EASA AD does not.

#### **Interim Action**

The FAA considers this AD to be an interim action. If final action is later identified, the FAA might consider further rulemaking then.

#### **Regulatory Flexibility Act**

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

#### **Costs of Compliance**

The FAA estimates that this AD affects 390 helicopters of U.S. Registry. Labor rates are estimated at \$85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this AD.

Accomplishing a ground test of the UP/DOWN switches for proper function takes a minimal amount of time for a nominal cost. Installing a placard and revising the existing RFM for your helicopter takes about 0.5 work-hour for an estimated cost of \$43 per helicopter and \$16,770 for the U.S. fleet.

Alternatively, replacing the affected DUNLOP cyclic stick grip takes about 2.5 work-hours and parts cost about \$2,500 for an estimated cost of \$2,713.

#### **FAA's Justification and Determination of the Effective Date**

Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for "good cause" finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because there are required corrective actions that must be completed before the next hoist operation. Therefore, notice and opportunity for prior public comment are impracticable and contrary to public interest pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the reasons stated above, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

#### **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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect

on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866, and
2. Will not affect intrastate aviation in Alaska.

#### **List of Subjects in 14 CFR Part 39**

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

#### **Adoption of the Amendment**

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

#### **PART 39—AIRWORTHINESS DIRECTIVES**

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

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

#### **§ 39.13 [Amended]**

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

#### **2020-24-03 Airbus Helicopters:**

Amendment 39-21333; Docket No. FAA-2020-1027; Project Identifier MCAI-2020-01375-R.

#### **(a) Applicability**

This airworthiness directive (AD) applies to Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350D, AS355E, AS355F, AS355F1, and AS355F2 helicopters, certificated in any category, with DUNLOP cyclic stick grip manufacturer part number AC66444 with UP/DOWN switches for rescue hoist control installed.

#### **(b) Unsafe Condition**

This AD defines the unsafe condition as inadvertent activation of the rescue hoist cable cutter and consequent detachment of an external load or person from the helicopter hoist. This condition could result in personal injury or injury to persons on the ground.

#### **(c) Effective Date**

This AD becomes effective December 16, 2020.

#### **(d) Compliance**

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

#### **(e) Required Actions**

(1) Before each hoist operation, accomplish a ground test of the UP/DOWN switches for proper function. If there is any



uncommanded hoist action, before further flight, remove the DUNLOP cyclic stick grip from service.

(2) Before the next hoist operation:

(i) Install a placard in full view of the pilot by following the Accomplishment Instructions, paragraph 3.B., of Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 01.00.58 or 01.00.72, each Revision 0 and dated October 1, 2020 (EASB 01.00.58 or 01.00.72), as applicable to your helicopter.

(ii) Revise the existing Rotorcraft Flight Manual (RFM) for your helicopter by inserting the Limitations page applicable to your helicopter model and version from Appendix 4.C. through L, of EASB 01.00.58 or 01.00.72. Inserting a different document with information identical to that in Appendix 4.C. through L., of EASB 01.00.58 or 01.00.72, as applicable to your helicopter model and version, is acceptable for compliance with the requirement of this paragraph.

(3) After complying with paragraph (e)(2) of this AD, each time the DUNLOP cyclic stick grip that is identified in paragraph (a) of this AD is removed from the helicopter, you may remove the placard and RFM revision that are required by paragraphs (e)(2)(i) and (ii) of this AD. Before the DUNLOP cyclic stick grip is re-installed, you must re-install the placard and RFM revision that are required by paragraphs (e)(2)(i) and (ii) of this AD.

(4) As of the effective date of this AD, do not install a DUNLOP cyclic stick grip that is identified in paragraph (a) of this AD unless the requirements of paragraphs (e)(1) and (2) of this AD have been accomplished.

#### (f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Daniel E. Moore, Aviation Safety Engineer, Regulations & Policy Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817-222-5110; email 9-ASW-FTW-AMOC-Requests@faa.gov.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggests that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

#### (g) Additional Information

The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD No. 2020-0217-E, dated October 6, 2020. You may view the EASA AD on the internet at <https://www.regulations.gov> by searching for and locating it in Docket No. FAA-2020-1027.

#### (h) Subject

Joint Aircraft Service Component (JASC) Code: 6700, Rotorcraft Flight Control.

#### (i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of

the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

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

(i) Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 01.00.58, Revision 0, dated October 1, 2020.

(ii) Airbus Helicopters EASB No. 01.00.72, Revision 0, dated October 1, 2020.

**Note 1 to paragraph (i)(2):** Airbus Helicopters EASB Nos. 01.00.58 and 01.00.72, each Revision 0 and dated October 1, 2020, are co-published as one document.

(3) For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972-641-0000 or 800-232-0323; fax 972-641-3775; or at <https://www.airbus.com/helicopters/services/technical-support.html>.

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N-321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817-222-5110.

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

Issued on November 12, 2020.

**Lance T. Gant,**

*Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2020-26422 Filed 11-30-20; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2020-0701; Airspace Docket No. 20-ASO-19]

**RIN 2120-AA66**

### Establishment of Class D and Class E Airspace and Amendment of Class E Airspace; Nashville, TN

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class D and Class E airspace designated as an extension to Class D or E surface area, and amends Class E airspace extending upward from 700 feet above the surface for John C. Tune Airport, Nashville, TN, as a new air traffic control tower shall service the airport. This action also updates the geographic coordinates of the airport, as well as Music City

Executive Airport, (formerly Sumner County Regional Airport), Lebanon Municipal Airport, and Murfreesboro Municipal Airport. In addition, this action establishes Class E airspace extending upward from 700 feet above the surface for Vanderbilt University Hospital Heliport, as instrument approach procedures have been designed for the heliport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

**DATES:** Effective 0901 UTC, June 17, 2021. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at [https://www.faa.gov/air\\_traffic/publications/](https://www.faa.gov/air_traffic/publications/). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; Telephone: (202) 267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov) or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337; Telephone (404) 305-6364.

#### SUPPLEMENTARY INFORMATION:

#### Authority for This Rulemaking

The FAA's authority to issue rule regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace in Nashville, TN to support IFR operations in the area.

## History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 55627, September 9, 2020) for Docket No. FAA–2020–0701 to establish Class D and Class E airspace designated as an extension to Class D airspace for John C. Tune Airport, Nashville, TN, as a new air traffic control tower shall service the airport. Also, the FAA proposed to increase the existing Class E airspace extending upward from 700 feet above the surface, and update the geographic coordinates of several airports in the area. In addition, the FAA proposed to establish Class E airspace extending upward from 700 feet above the surface for Vanderbilt University Hospital Heliport, as instrument approaches have been designed for the heliport.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and Class E airspace designations are published in Paragraph 5000, 6004 and 6005, respectively, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

## Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic routes, and reporting points.

## The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 establishes Class D and Class E airspace designated as an extension to Class D airspace for John C. Tune Airport, Nashville, TN, as a new air traffic control tower shall service the airport. Also, the FAA increases the existing Class E airspace extending upward from 700 feet above the surface, from 8-miles to 8.6-miles, due to a reevaluation of the airspace. In addition, the FAA updates the geographic coordinates of the airport, as well as Music City Executive Airport (formerly Sumner County Regional Airport), Lebanon Municipal Airport, and Murfreesboro Municipal

Airport, to coincide with the FAA's aeronautical database. Also, the FAA establishes Class E airspace extending upward from 700 feet above the surface for Vanderbilt University Hospital Heliport, as instrument approach procedures have been designed for the heliport. Finally, subsequent to publication of the NPRM, the FAA found that Sumner County Regional Airport is now Music City Executive Airport. This action updates the name of the airport.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

## Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It therefore: (1) Is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures an air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

## Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

## Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, effective September 15, 2020, is amended as follows:

*Paragraph 5000 Class D Airspace.*

\* \* \* \* \*

### ASO TN D Nashville, TN [New]

John C. Tune Airport, TN  
(Lat. 36°10'59"W N, long. 86°53'11" W)

That airspace extending upward from the surface to and including 2,300 feet MSL, within a 4.1-mile radius of John C. Tune Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

*Paragraph 6004 Class E Airspace Designated as an Extension to Class D or E Surface Area.*

\* \* \* \* \*

### ASO TN E4 Nashville, TN [New]

John C. Tune Airport, TN  
(Lat. 36°10'59"W N, long. 86°53'11" W)

That airspace extending upward from the surface within 1.2-miles each side of the 198° bearing from the airport, extending from the 4.1-mile radius to 6.1-miles south of the airport, and within 1.2-miles each side of the 018° bearing from the airport, extending from the 4.1-mile radius to 6.1-miles north of the airport.

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

### ASO TN E5 Nashville, TN [Amended]

Nashville International Airport, TN  
(Lat. 36°07'28" N, long. 86°40'41" W)  
Smyrna Airport  
(Lat. 36°00'32" N, long. 86°31'12" W)  
Music City Executive Airport  
(Lat. 36°22'30" N, long. 86°24'30" W)  
Lebanon Municipal Airport  
(Lat. 36°11'25" N, long. 86°18'56" W)  
Murfreesboro Municipal Airport  
(Lat. 35°52'43" N, long. 86°22'39" W)  
John C. Tune Airport  
(Lat. 36°10'59" N, long. 86°53'11" W)  
Vanderbilt University Medical Center  
Hospital  
Point In Space Coordinates  
(Lat. 36°08'30" N, long. 86°48'6" W)

That airspace extending upward from 700 feet above the surface within a 15 mile radius of Nashville International Airport, and within a 9-mile radius of Smyrna Airport, and within a 7-mile radius of Music City Executive Airport, and within a 10-mile radius of Lebanon Municipal Airport, and within a 9-mile radius of Murfreesboro Municipal Airport, and within an 8.6-mile radius of John C. Tune Airport, and that airspace within a 6-mile radius of the Point In Space serving Vanderbilt University Medical Center Hospital.

Issued in College Park, Georgia, on November 24, 2020.

**Andreea C. Davis,**

*Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2020-26439 Filed 11-30-20; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9934]

RIN 1545-BP57

#### Coordination of Extraordinary Disposition and Disqualified Basis Rules

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations under sections 245A and 951A of the Internal Revenue Code (the “Code”) that coordinate the extraordinary disposition rule under section 245A of the Code with the disqualified basis and disqualified payment rules under section 951A of the Code. This document also contains final regulations under section 6038 of the Code regarding information reporting to facilitate administration of the final regulations. The final regulations affect corporations that are subject to the extraordinary disposition rule and the disqualified basis rule or the disqualified payment rule. This document finalizes proposed regulations published on August 27, 2020.

#### **DATES:**

*Effective date:* These regulations are effective on January 12, 2021.

*Applicability dates:* For dates of applicability, see §§ 1.245A-11 and 1.6038-2(m)(5).

#### **FOR FURTHER INFORMATION CONTACT:**

Logan M. Kincheloe, (202) 317-6937 (not a toll-free number).

## SUPPLEMENTARY INFORMATION:

### Background

On August 27, 2020, the Department of the Treasury (“Treasury Department”) and the IRS published proposed regulations (REG-124737-19) under sections 245A, 951A, and 6038 in the **Federal Register** (85 FR 53098) (the “proposed regulations”).

The Treasury Department and the IRS received one written comment with respect to the proposed regulations; however, the comment was not substantively related to, and did not suggest any revisions to, the proposed regulations. Therefore, this preamble does not address the comment. The written comment is available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing on the proposed regulations was not held because there were no requests to speak.

This document contains amendments to 26 CFR part 1 under sections 245A, 951A, and 6038 (the “final regulations”). Any term used but not defined in this preamble has the meaning given to it in the final regulations or the preamble to the proposed regulations.

The effective date of these regulations is delayed until January 12, 2021, to provide for the orderly amendment of § 1.951A-2 by TD 9922, 85 FR 71998, published on November 12, 2020, and with a delayed effective date of January 11, 2021. The changes to § 1.951A-2 made in these regulations are to the regulation text as amended by TD 9922.

### Explanation of Revisions

#### *I. Overview*

The extraordinary disposition rule and the disqualified basis rule generally address certain transactions, involving related controlled foreign corporations (“CFCs”) of a section 245A shareholder, that were not subject to current U.S. tax solely by reason of having occurred during the disqualified period. In general, as to the section 245A shareholder, the extraordinary disposition rule ensures that earnings and profits generated by such a transaction are subject to U.S. tax when distributed as a dividend, and the disqualified basis rule ensures that basis generated by the transaction does not offset or reduce income that would otherwise be subject to U.S. tax at the section 245A shareholder-level under section 951(a)(1)(A) or 951A(a), or at the CFC-level under section 882(a) (that is, as income effectively connected with the conduct of a trade or business in the United States). See §§ 1.245A-5 and 1.951A-2(c)(5).

Absent a coordination mechanism, the extraordinary disposition rule and the disqualified basis rule could give rise to excess taxation as to a section 245A shareholder, because the earnings and profits to which the extraordinary disposition rule applies (“extraordinary disposition E&P”), and the basis to which the disqualified basis rule applies (“disqualified basis”), are generally a function of a single amount of gain. The proposed regulations coordinate the extraordinary disposition rule and the disqualified basis rule through two operative rules: The DQB reduction rule, which reduces disqualified basis in certain cases, and the EDA reduction rule, which reduces an extraordinary disposition account in certain cases. See proposed §§ 1.245A-7 and 1.245A-8. These operative rules also apply to coordinate the extraordinary disposition rule and the disqualified payment rule, which addresses transactions similar to those to which the disqualified basis rule applies.

This rulemaking finalizes the proposed regulations, with one revision, as discussed in part II of this Explanation of Revisions.

#### *II. The DQB Reduction Rule—Treatment of Prior Extraordinary Disposition Amounts*

Under the proposed regulations, the DQB reduction rule generally applies when, as to a section 245A shareholder, extraordinary disposition E&P become subject to U.S. tax by reason of the application of the extraordinary disposition rule to a distribution of the extraordinary disposition E&P. See proposed §§ 1.245A-7(b) and 1.245A-8(b). In general, the DQB reduction rule provides that basis attributable to gain to which the extraordinary disposition E&P are also attributable is no longer disqualified basis. *Id.*

The preamble to the proposed regulations noted that the Treasury Department and the IRS were studying whether the DQB reduction rule should also apply by reason of a prior extraordinary disposition amount described in § 1.245A-5(c)(3)(i)(D)(1)(i) through (iv). The preamble requested comments on this matter, but none were received. Such a prior extraordinary disposition amount generally represents extraordinary disposition E&P that have become subject to U.S. tax as to a section 245A shareholder other than by direct application of the extraordinary disposition rule—for example, extraordinary disposition E&P that give rise to an income inclusion to the section 245A shareholder by reason of sections 951(a)(1)(B) and 956(a). Under the extraordinary disposition rule, the

application of the other provision to the extraordinary disposition E&P results in a reduction to the application of the extraordinary disposition rule, because otherwise the earnings and profits (or an amount of other earnings and profits) could be taxed as to the section 245A shareholder both by reason of the other provision and the extraordinary disposition rule. *See* § 1.245A–5(c)(3)(i)(D). This reduction to the application of the extraordinary disposition rule will generally result in an extraordinary disposition being subject to a single level of U.S. tax.

The Treasury Department and the IRS have determined that the DQB reduction rule should also apply by reason of a prior extraordinary disposition amount described in § 1.245A–5(c)(3)(i)(D)(1)(i) through (iv), and therefore the final regulations provide a rule to this effect. *See* §§ 1.245A–7(b)(3) and 1.245A–8(b)(6). Absent such an approach, gain to which extraordinary disposition E&P and disqualified basis are attributable could in effect be taxed both by reason of the disqualified basis rule and a provision other than the extraordinary disposition rule.

### Applicability Dates

The final regulations apply to taxable years of foreign corporations beginning on or after December 1, 2020, and to taxable years of section 245A shareholders in which or with which such taxable years of foreign corporations end. *See* § 1.245A–11(a). In addition, taxpayers may choose to apply the final regulations to taxable years beginning before December 1, 2020, subject to certain limitations. *See* § 1.245A–11(b).

### Special Analyses

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

### I. Paperwork Reduction Act (“PRA”)

The collections of information in the final regulations are in § 1.6038–2(f)(17) and (18). Under the PRA (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor and a person is not required to

respond to a collection of information unless it displays a valid OMB control number.

The collection of information in § 1.6038–2(f)(17) is mandatory for every U.S. shareholder of a CFC that holds an item of property that has disqualified basis within the meaning of § 1.951A–3(h)(2) during an annual accounting period and files Form 5471 for that period (OMB control number 1545–0123). The collection of information in § 1.6038–2(f)(17) is satisfied by providing information about the items of property with disqualified basis held by the CFC during the CFC’s accounting period as Form 5471 and its instructions may prescribe. For purposes of the PRA, the reporting burden associated with § 1.6038–2(f)(17) will be reflected in the applicable PRA submission associated with Form 5471. As provided below, the estimated number of respondents for the reporting burden associated with § 1.6038–2(f)(17) is 7,500–8,500, based on estimates provided by the Research, Applied Analytics and Statistics Division of the IRS.

The related new or revised tax form is as follows:

|                             | New   | Revision of existing form | Number of respondents (estimate) |
|-----------------------------|-------|---------------------------|----------------------------------|
| Schedule to Form 5471 ..... | ..... | ✓                         | 7,500–8,500                      |

The collection of information in § 1.6038–2(f)(18) is mandatory for every U.S. shareholder of a CFC that applies the rules of §§ 1.245A–6 through 1.245A–11 during an annual accounting period and files Form 5471 for that period (OMB control number 1545–0123). The collection of information in § 1.6038–2(f)(18) is satisfied by providing information about the reduction to an extraordinary

disposition account made pursuant to § 1.245A–7(b) or § 1.245A–8(b) and reductions to an item of specified property’s disqualified basis pursuant to § 1.245A–7(c) or § 1.245A–8(c) during the corporation’s accounting period as Form 5471 and its instructions may prescribe. For purposes of the PRA, the reporting burden associated with § 1.6038–2(f)(18) will be reflected in the applicable PRA submission associated

with Form 5471. As provided below, the estimated number of respondents for the reporting burden associated with § 1.6038–2(f)(18) is 7,500–8,500, based on estimates provided by the Research, Applied Analytics and Statistics Division of the IRS.

The related new or revised tax form is as follows:

|                             | New   | Revision of existing form | Number of respondents (estimate) |
|-----------------------------|-------|---------------------------|----------------------------------|
| Schedule to Form 5471 ..... | ..... | ✓                         | 7,500–8,500                      |

The current status of the PRA submissions related to the new revised Form 5471 as a result of the information collections in the final regulations is provided in the accompanying table. The reporting burdens associated with the information collections in § 1.6038–2(f)(17) and (18) are included in the aggregated burden estimates for OMB control number 1545–0123, which represents a total estimated burden time for all forms and schedules for

corporations of 3.157 billion hours and total estimated monetized costs of \$58.148 billion (\$2017). The overall burden estimates provided in 1545–0123 are aggregate amounts that relate to the entire package of forms associated with the OMB control number and will in the future include but not isolate the estimated burden of the tax forms that will be revised as a result of the information collections in the final regulations. These numbers are

therefore unrelated to the future calculations needed to assess the burden imposed by the final regulations. The Treasury Department and the IRS urge readers to recognize that these numbers are duplicates of estimates provided for informational purposes in other proposed and final regulatory actions and to guard against over-counting the burden that international tax provisions imposed before the Act.

No burden estimates specific to the final regulations are currently available. The Treasury Department and the IRS have not identified any burden estimates, including those for new

information collections, related to the requirements under the final regulations. Proposed revisions to these forms that reflect the information collections contained in these final

regulations will be made available for public comment at [www.irs.gov/draftforms](http://www.irs.gov/draftforms) and will not be finalized until after approved by OMB under the PRA.

| Information collection | Type of filer                                                                                                                                                                                                                                                                                                                                     | OMB No.(s) | Status                                                                                                                            |
|------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|-----------------------------------------------------------------------------------------------------------------------------------|
| Form 5471 .....        | Business (NEW Model) .....                                                                                                                                                                                                                                                                                                                        | 1545-0123  | Published in the <b>Federal Register</b> on 9/30/19. Public Comment period closed on 11/29/19. Approved by OMB through 1/31/2021. |
|                        | <a href="https://www.federalregister.gov/documents/2019/09/30/2019-21068/proposed-collection-comment-request-for-forms-1065-1066-1120-1120-c-1120-f-1120-h-1120-nd-1120-s">https://www.federalregister.gov/documents/2019/09/30/2019-21068/proposed-collection-comment-request-for-forms-1065-1066-1120-1120-c-1120-f-1120-h-1120-nd-1120-s</a> . |            |                                                                                                                                   |

## II. Regulatory Flexibility Act

It is hereby certified that this rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). The small entities that are subject to § 1.245A-5 are small entities that are U.S. shareholders of certain foreign corporations that are otherwise eligible for the section 245A deduction on distributions from the foreign corporation. The small entities that are subject to § 1.951A-2(c)(5) are U.S. shareholders of certain foreign corporations that are subject to tax under section 951 with respect to subpart F income of those foreign corporations or section 951A with respect to tested income of those foreign corporations.

The taxpayers potentially affected by these final regulations are U.S. shareholders of at least two related foreign corporations, one that has an extraordinary disposition account and the other that has assets with disqualified basis corresponding to the extraordinary disposition account. This means that the foreign corporation with the extraordinary disposition account has or had a fiscal year and engaged in a disposition of property (i) during the period between January 1, 2018, and the end of the transferor foreign corporation's last taxable year beginning before 2018; (ii) outside the ordinary course of the foreign corporation's activities; and (iii) generally, while the corporation was a CFC.

The Treasury Department and the IRS have not estimated how many taxpayers are likely to be affected by these regulations because data on the taxpayers that may have engaged in these particular transactions are not readily available. Based on tabulations of the 2014 Statistics of Income Study file the Treasury Department and the IRS estimate that there are approximately 5,000 domestic corporations with at least one fiscal year

CFC. Previous estimates suggest that approximately half of domestic corporations with CFCs have less than \$25 million in gross receipts. However, the number of potentially affected taxpayers is smaller than the number of domestic corporations with at least one fiscal year CFC because a domestic corporation will not be affected unless its fiscal year CFC engages in a non-routine sale with a related party that creates an extraordinary disposition account and disqualified basis, and the domestic corporation must then incur the type of cost (limitation of the section 245A deduction or allocation of deductions or losses to residual CFC gross income and reduction in untaxed earnings) that causes these final regulations to apply. There are several industries that may be identified as small even through their annual receipts are above \$25 million or because they have fewer employees than the SBA Size Standard for that industry. The Treasury Department and the IRS do not have more precise data indicating the number of small entities that will be potentially affected by the regulations. The rule may affect a substantial number of small entities, but data are not readily available to assess how many entities will be affected. Nevertheless, for the reasons described below, the Treasury Department and the IRS have determined that the regulations will not have a significant economic impact on small entities.

The Treasury Department and the IRS have concluded that there is no significant economic impact on such entities as a result of the final regulations. To make this determination, the Treasury Department and the IRS calculated the ratio of estimated global intangible lowed-taxed income ("GILTI") and subpart F income tax attributable to these businesses to aggregate total sales data. Bureau of Economic Analysis data on the activities of multinational enterprises report total sales of all foreign affiliates of U.S. parents of \$7,183 billion in 2017

(accessed at this web address in December, 2018: <https://apps.bea.gov/iTable/iTable.cfm?ReqID=2&step=1>). Projections for GILTI and Subpart F tax revenues average \$20 billion per year over the ten-year budget window (see Joint Committee on Taxation, Estimated Budget Effects of the Conference Agreement for H.R. 1, The "Tax Cuts and Jobs Act, JCX-67-17, December 18, 2017), resulting in a less than 1 percent share of GILTI and Subpart F tax in total sales of U.S.-parented affiliates. Compliance costs for these regulations will be a small fraction of the revenue amounts. Thus, any tax regulation that affects the proceeds from GILTI and subpart F income would have an economic impact of less than 3 to 5 percent of "receipts" (as that term is defined in 13 CFR 121.104, the provision for calculating small business receipts, to mean sales and any other measure of gross income), an economic impact that the Treasury Department and IRS regard as the threshold for significant under the Regulatory Flexibility Act. This calculated percentage is furthermore an upper bound on the true expected effect of the final regulations because not all the GILTI and subpart F income estimated to be attributable to small entities will be affected by the final regulations. For example, GILTI and subpart F income that is not attributable to a CFC that holds property with disqualified basis (or property that would otherwise have disqualified basis in the absence of these regulations) is not affected by these final regulations. Consequently, the Treasury Department and the IRS have determined that these final regulations will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the proposed regulations (REG-124737-19) preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment

on the impact on small businesses, and no comments were received.

### III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. These regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

### IV. Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

### Drafting Information

The principal author of the final regulations is Logan M. Kincheloe, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order for §§ 1.245A–6 through 1.245A–11 to read in part as follows:

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

Sections 1.245A–6 through 1.245A–11 also issued under 26 U.S.C. 245A(g), 882(c)(1)(A), 951A, 954(b)(5), 954(c)(6), and 965(o).

■ **Par. 2.** Section 1.245A–5 is amended by:

■ 1. In the first sentence of paragraph (c)(3)(i)(A), adding immediately after the language “by the prior extraordinary disposition amount” the language “and as provided in § 1.245A–7 or § 1.245A–8”.

■ 2. Revising paragraph (j)(8)(ii).

The revision reads as follows:

#### § 1.245A–5 Limitation of section 245A deduction and section 954(c)(6) exception.

\* \* \* \* \*

(j) \* \* \*

(8) \* \* \*

(ii) *Analysis.* Because the royalty prepayment was carried out with a principal purpose of avoiding the purposes of this section, appropriate adjustments are required to be made under the anti-abuse rule in paragraph (h) of this section. CFC1 is a CFC that has a November 30 taxable year, so under paragraph (c)(3)(iii) of this section, CFC1 has a disqualified period beginning on January 1, 2018, and ending on November 30, 2018. In addition, even though the intangible property licensed by CFC1 to CFC2 is specified property, CFC2’s prepayment of the royalty would not be treated as a disposition of the specified property by CFC1 and, therefore, would not constitute an extraordinary disposition (and thus would not give rise to extraordinary disposition E&P), absent the application of the anti-abuse rule of paragraph (h) of this section. Pursuant to paragraph (h) of this section, the earnings and profits of CFC1 generated as a result of the \$100x of prepaid royalty are treated as extraordinary disposition E&P for purposes of this section and, therefore, US1 has an extraordinary disposition account with respect to CFC1 of \$100x. In addition, the prepaid royalty gives rise to a disqualified payment (as defined in § 1.951A–2(c)(6)(ii)(A)) of \$100x. As a result, § 1.245A–7(b) or § 1.245A–8(b), as applicable, applies to reduce the disqualified payment in the same manner as if the disqualified payment were disqualified basis, and § 1.245A–7(c) or § 1.245A–8(c), as applicable, applies to reduce the extraordinary disposition account in the same manner as if the deductions directly or indirectly related to the disqualified payment were deductions attributable to disqualified basis of an item of specified property that corresponds to the extraordinary disposition account.

\* \* \* \* \*

■ **Par. 3.** Sections 1.245A–6 through 1.245A–11 are added to read as follows:

\* \* \* \* \*

1.245A–6 Coordination of extraordinary disposition and disqualified basis rules.  
1.245A–7 Coordination rules for simple cases.  
1.245A–8 Coordination rules for complex cases.  
1.245A–9 Other rules and definitions.  
1.245A–10 Examples.  
1.245A–11 Applicability dates.  
\* \* \* \* \*

#### § 1.245A–6 Coordination of extraordinary disposition and disqualified basis rules.

(a) *Scope.* This section and §§ 1.245A–7 through 1.245A–11 coordinate the application of the extraordinary disposition rules of § 1.245A–5(c) and (d) and the disqualified basis rule of § 1.951A–2(c)(5). Section 1.245A–7 provides coordination rules for simple cases, and § 1.245A–8 provides coordination rules for complex cases. Section 1.245A–9 provides definitions and other rules, including rules of general applicability for purposes of this section and §§ 1.245A–7 through 1.245A–11. Section 1.245A–10 provides examples illustrating the application of this section and §§ 1.245A–7 through 1.245A–9. Section 1.245A–11 provides applicability dates.

(b) *Conditions to apply coordination rules for simple cases.* For a taxable year of a section 245A shareholder for which the conditions described in paragraphs (b)(1) and (2) of this section are satisfied, the section 245A shareholder may apply the coordination rules of § 1.245A–7 (rules for simple cases) to an extraordinary disposition account of the section 245A shareholder with respect to an SFC and disqualified basis of an item of specified property that corresponds to the extraordinary disposition account (as determined pursuant to § 1.245A–9(b)(1)). If the conditions are not satisfied, then the coordination rules of § 1.245A–8 (rules for complex cases) apply beginning with the first day of the first taxable year of the section 245A shareholder for which the conditions are not satisfied and all taxable years thereafter. If the conditions are satisfied for a taxable year of the section 245A shareholder but the section 245A shareholder chooses not to apply the coordination rules of § 1.245A–7 for that taxable year, then the coordination rules of § 1.245A–8 apply to that taxable year (though, for a subsequent taxable year, the section 245A shareholder may apply the coordination rules of § 1.245A–7, provided that the conditions described in paragraphs (b)(1) and (2) of this section are satisfied for such subsequent taxable year and have been satisfied for all earlier taxable years). For purposes of applying paragraphs (b)(1) and (2) of

this section, a reference to a section 245A shareholder, an SFC, or a CFC does not include a successor of the section 245A shareholder, the SFC, or the CFC, respectively.

(1) *Requirements related to the SFC.* The condition of this paragraph (b)(1) is satisfied for a taxable year of the section 245A shareholder if the following requirements are satisfied:

(i) On January 1, 2018, the section 245A shareholder owns (within the meaning of section 958(a)) all of the stock (by vote and value) of the SFC.

(ii) On each day of the taxable year of the section 245A shareholder, the section 245A shareholder owns (within the meaning of section 958(a)) all of the stock (by vote and value) of the SFC.

(iii) On no day during the taxable year of the section 245A shareholder was the SFC a distributing or controlled corporation in a transaction described in a section 355, or did the SFC acquire the assets of a corporation as to which there is an extraordinary disposition account pursuant to a transaction described in section 381 (that is, taking into account the requirements of this paragraph (b)(1) and paragraph (b)(2) of this section, the section 245A shareholder's extraordinary disposition account with respect to the SFC has not been not been adjusted pursuant to the rules of § 1.245A-5(c)(4)).

(2) *Requirements related to an item of specified property that corresponds to an extraordinary disposition account and a CFC holding the item.* The condition of this paragraph (b)(2) is satisfied for a taxable year of a section 245A shareholder if the following requirements are satisfied:

(i) For each item of specified property with disqualified basis that corresponds to the extraordinary disposition account, the item of specified property is held by a CFC immediately after the extraordinary disposition of the item of specified property.

(ii) For each CFC described in paragraph (b)(2)(i) of this section—

(A) All of the stock (by vote and value) of the CFC is owned (within the meaning of section 958(a)) by the section 245A shareholder and any domestic affiliates of the section 245A shareholder immediately after the extraordinary disposition described in paragraph (b)(2)(i) of this section;

(B) For each taxable year of the CFC that ends with or within the taxable year of the section 245A shareholder, there is no extraordinary disposition account with respect to the CFC, and the sum of the balance of the hybrid deduction accounts (as described in § 1.245A(e)-1(d)(1)) with respect to shares of stock of the CFC is zero (determined as of the

end of the taxable year of the CFC and taking into account any adjustments to the accounts for the taxable year); and

(C) On each day of each taxable year of the CFC that ends with or within the taxable year of the section 245A shareholder, and on each day of each taxable year of the CFC that begins with or within the taxable year of the section 245A shareholder—

(1) The CFC holds the item of specified property described in paragraph (b)(1)(i) of this section;

(2) The section 245A shareholder and any domestic affiliates own (within the meaning of section 958(a)) all of the stock (by vote and value) of the CFC;

(3) The CFC does not hold any item of specified property with disqualified basis other than an item of specified property that corresponds to the extraordinary disposition account;

(4) The CFC does not own an interest in a partnership, trust, or estate (directly or indirectly through one or more other partnerships, trusts, or estates) that holds an item of specified property with disqualified basis; and

(5) The CFC is not engaged in the conduct of a trade or business in the United States and therefore does not have ECTI, and the CFC does not have any deficit in earnings and profits subject to § 1.381(c)(2)-1(a)(5).

#### **§ 1.245A-7 Coordination rules for simple cases.**

(a) *Scope.* This section applies for a taxable year of a section 245A shareholder for which the conditions of § 1.245A-6(b)(1) and (2) are satisfied and for which the section 245A shareholder chooses to apply this section (in lieu of § 1.245A-8).

(b) *Reduction of disqualified basis by reason of an extraordinary disposition amount or tiered extraordinary disposition amount—*(1) *In general.* If, for a taxable year of a section 245A shareholder, an extraordinary disposition account of the section 245A shareholder gives rise to one or more extraordinary disposition amounts or tiered extraordinary disposition amounts, then, with respect to an item of specified property that corresponds to the extraordinary disposition account, the disqualified basis of the item of specified property is, solely for purposes of § 1.951A-2(c)(5), reduced (but not below zero) by an amount (determined in the functional currency in which the extraordinary disposition account is maintained) equal to the product of—

(i) The sum of the extraordinary disposition amounts and the tiered extraordinary disposition amounts; and

(ii) A fraction, the numerator of which is the disqualified basis of the item of specified property, and the denominator of which is the sum of the disqualified basis of each item of specified property that corresponds to the extraordinary disposition account.

(2) *Timing rules regarding disqualified basis.* See § 1.245A-9(b)(2) for timing rules regarding the determination of, and reduction to, disqualified basis of an item of specified property.

(3) *Special rule regarding prior extraordinary disposition amounts.* For purposes of paragraph (b)(1) of this section, to the extent that an extraordinary disposition account of a section 245A shareholder is reduced under § 1.245A-5(c)(3)(i)(A) by reason of a prior extraordinary disposition amount described in § 1.245A-5(c)(3)(i)(D)(1)(i) through (iv), the extraordinary disposition account is considered to give rise to an extraordinary disposition amount or tiered extraordinary disposition amount (and the amount by which the account is reduced is treated as an extraordinary disposition amount or tiered extraordinary disposition amount).

(c) *Reduction of extraordinary disposition account by reason of the allocation and apportionment of deductions or losses attributable to disqualified basis—*(1) *In general.* If, for a taxable year of a CFC, the CFC holds one or more items of specified property that correspond to an extraordinary disposition account of a section 245A shareholder with respect to an SFC, then the extraordinary disposition account is reduced (but not below zero) by the lesser of the amounts described in paragraphs (c)(1)(i) and (ii) of this section (each determined in the functional currency of the CFC).

(i) The excess (if any) of the adjusted earnings of the CFC for the taxable year of the CFC, over the sum of the previously taxed earnings and profits accounts with respect to the CFC for purposes of section 959 (determined as of the end of the taxable year of the CFC and taking into account any adjustments to the accounts for the taxable year).

(ii) The balance of the section 245A shareholder's RGI account with respect to the CFC (determined as of the end of the taxable year of the CFC, but without regard to the application of paragraph (c)(4)(ii) of this section for the taxable year).

(2) *Timing of reduction to extraordinary disposition account.* See § 1.245A-9(b)(3) for timing rules regarding the reduction to an extraordinary disposition account.



(3) *Adjusted earnings.* The term *adjusted earnings* means, with respect to a CFC and a taxable year of the CFC, the earnings and profits of the CFC, determined as of the end of the CFC's taxable year (taking into account all distributions during the taxable year), and with the adjustments described in paragraphs (c)(3)(i) through (iii) of this section.

(i) The earnings and profits are increased by the amount of any deduction or loss that is or was allocated and apportioned to residual CFC gross income of the CFC solely by reason of § 1.951A-2(c)(5)(i).

(ii) The earnings and profits are decreased by the amount by which an RGI account with respect to the CFC has been decreased pursuant to paragraph (c)(4)(ii) of this section for a prior taxable year of the CFC.

(iii) The earnings and profits are determined without regard to income described in section 245(a)(5)(A) or dividends described in section 245(a)(5)(B) (determined without regard to section 245(a)(12)).

(4) *RGI account.* For a taxable year of a CFC, the following rules apply to determine the balance of a section 245A shareholder's RGI account with respect to the CFC:

(i) The balance of the RGI account is increased by the sum of the amounts of deductions and losses of the CFC that, but for § 1.951A-2(c)(5)(i), would have decreased one or more categories of the CFC's positive subpart F income or the CFC's tested income, or increased or given rise to a tested loss or one or more qualified deficits of the CFC.

(ii) The balance of the RGI account is decreased to the extent that, by reason of the application of paragraph (c)(1) of this section with respect to the taxable year of the CFC, there is a reduction to the extraordinary disposition account of the section 245A shareholder.

#### **§ 1.245A-8 Coordination rules for complex cases.**

(a) *Scope.* This section applies beginning with the first day of the first taxable year of a section 245A shareholder for which § 1.245A-7 does not apply and for all taxable years thereafter, or for a taxable year of a section 245A shareholder for which the section 245A shareholder chooses not to apply § 1.245A-7.

(b) *Reduction of disqualified basis by reason of an extraordinary disposition amount or tiered extraordinary disposition amount—(1) In general.* If, for a taxable year of a section 245A shareholder, an extraordinary disposition account of the section 245A shareholder gives rise to one or more

extraordinary disposition amounts or tiered extraordinary disposition amounts, then, with respect to an item of specified property that corresponds to the extraordinary disposition account and for which the ownership requirement of paragraph (b)(3)(i) of this section is satisfied for the taxable year of the section 245A shareholder, solely for purposes of § 1.951A-2(c)(5), the disqualified basis of the item of specified property is reduced (but not below zero) by an amount (determined in the functional currency in which the extraordinary disposition account is maintained) equal to the product of—

(i) The excess (if any) of—

(A) The sum of the extraordinary disposition amounts and the tiered extraordinary disposition amounts; over

(B) The basis benefit account with respect to the extraordinary disposition account (determined as of the end of the taxable year of the section 245A shareholder, and without regard to the application of paragraph (b)(4)(i)(B) of this section for the taxable year); and

(ii) A fraction, the numerator of which is the disqualified basis of the item of specified property, and the denominator of which is the sum of the disqualified basis of each item of specified property that corresponds to the extraordinary disposition account and for which the ownership requirement of paragraph (b)(3)(i) of this section is satisfied for the taxable year of the section 245A shareholder.

(2) *Timing rules regarding disqualified basis.* See § 1.245A-9(b)(2) for timing rules regarding the determination of, and reduction to, disqualified basis of an item of specified property.

(3) *Ownership requirement with respect to an item of specified property—(i) In general.* For a taxable year of a section 245A shareholder, the ownership requirement of this paragraph (b)(3)(i) is satisfied with respect to an item of specified property if, on at least one day that falls within the taxable year, the item of specified property is held by—

(A) The section 245A shareholder;

(B) A person (other than the section 245A shareholder) that, on at least one day that falls within the section 245A shareholder's taxable year, is a related party with respect to the section 245A shareholder (such a person, a *qualified related party* with respect to the section 245A shareholder for the taxable year of the section 245A shareholder); or

(C) A specified entity at least 10 percent of the interests of which are, on at least one day that falls within the section 245A shareholder's taxable year, owned directly or indirectly through

one or more other specified entities by the section 245A shareholder or a qualified related party.

(ii) *Rules for determining an interest in a specified entity.* For purposes of paragraph (b)(3)(i)(C) of this section, the phrase *at least 10 percent of the interests* means—

(A) If the specified entity is a foreign corporation, at least 10 percent of the stock (by vote or value) of the foreign corporation;

(B) If the specified entity is a partnership, at least 10 percent of the interests in the capital or profits of the partnership; or

(C) If the specified entity is not a foreign corporation or a partnership, at least 10 percent of the value of the interests in the specified entity.

(4) *Basis benefit account—(i) General rules.* The term *basis benefit account* means, with respect to an extraordinary disposition account of a section 245A shareholder, an account of the section 245A shareholder (the initial balance of which is zero), adjusted pursuant to the rules of paragraphs (b)(4)(i)(A) and (B) of this section on the last day of each taxable year of the section 245A shareholder. The basis benefit account must be maintained in the same functional currency as the extraordinary disposition account.

(A) The balance of the basis benefit account is increased to the extent that a basis benefit amount with respect to an item of specified property that corresponds to the section 245A shareholder's extraordinary disposition account is assigned to the taxable year of the section 245A shareholder. However, if the extraordinary disposition ownership percentage applicable to the section 245A shareholder's extraordinary disposition account is less than 100 percent, then, the basis benefit amount is instead increased by the amount equal to the basis benefit amount multiplied by the extraordinary disposition ownership percentage.

(B) The balance of the basis benefit account is decreased to the extent that, for a taxable year that includes the date on which the section 245A shareholder's taxable year ends, disqualified basis of an item of specified property would have been reduced pursuant to paragraph (b)(1) of this section but for an amount in the basis benefit account.

(ii) *Rules for determining a basis benefit amount—(A) In general.* The term *basis benefit amount* means, with respect to an item of specified property that has disqualified basis, the portion of disqualified basis that, for a taxable year, is directly (or indirectly through



one or more specified entities that are not corporations) taken into account for U.S. tax purposes by a U.S. tax resident, a CFC described in § 1.267A-5(a)(17), or a specified foreign person and—

(1) Reduces the amount of the U.S. tax resident's taxable income, one or more categories of the CFC's positive subpart F income, the CFC's tested income, or the specified foreign person's ECTI, as applicable; or

(2) Prevents a decrease or offset of the amount of the CFC's tested loss or qualified deficits.

(B) *Rules for determining whether disqualified basis of an item of specified property is taken into account.* For purposes of paragraph (b)(4)(ii)(A) of this section, disqualified basis of an item of specified property is taken into account for U.S. tax purposes without regard to whether the disqualified basis is reduced or eliminated under § 1.951A-3(h)(2)(ii)(B)(1).

(C) *Timing rules when disqualified basis gives rise to a deferred or disallowed loss.* To the extent disqualified basis of an item of specified property gives rise to a deduction or loss during a taxable year that is deferred, then the determination of whether the item of deduction or loss gives rise to a basis benefit amount under paragraph (b)(4)(ii)(A) of this section is made when the item of deduction or loss is no longer deferred. In addition, to the extent disqualified basis of an item of specified property gives rise to a deduction or loss during a taxable year that is disallowed under section 267(a)(1), then a basis benefit amount is treated as occurring in the taxable year when and to the extent that gain is reduced pursuant to section 267(d), and provided that the gain is described in paragraph (b)(4)(ii)(A) of this section.

(iii) *Rules for assigning a basis benefit amount to a taxable year of a section 245A shareholder—(A) In general.* For purposes of applying paragraph (b)(4)(i)(A) of this section with respect to a section 245A shareholder, a basis benefit amount with respect to an item of specified property is assigned to a taxable year of the section 245A shareholder if—

(1) With respect to the item of specified property, the ownership requirement of paragraph (b)(3)(i) of this section is satisfied for the taxable year of the section 245A shareholder; and

(2) The basis benefit amount occurs during the taxable year of the section 245A shareholder, or a taxable year of a U.S. tax resident (other than the section 245A shareholder), a CFC described in § 1.267A-5(a)(17), or a specified foreign person, as applicable, that—

(i) Ends with or within the taxable year of the section 245A shareholder; or

(ii) Begins with or within the taxable year of the section 245A shareholder, but only in a case in which but for this paragraph (b)(4)(iii)(A)(2)(ii) the basis benefit amount would not be assigned to a taxable year of the section 245A shareholder.

(B) *Anti-duplication rule.* For purposes of paragraph (b)(4)(i)(A) of this section, to the extent that disqualified basis of an item of specified property gives rise to a basis benefit amount that is assigned to a taxable year of a section 245A shareholder under paragraph (b)(4)(iii)(A) of this section, and thereafter such disqualified basis gives rise to an additional basis benefit amount, the additional basis benefit amount cannot be assigned to another taxable year of any section 245A shareholder. Thus, for example, if the entire amount of disqualified basis of an item of specified property gives rise to a basis benefit amount for a particular taxable year of a CFC and is assigned to a taxable year of a section 245A shareholder but, pursuant to § 1.951A-3(h)(2)(ii)(B)(1)(ii), the disqualified basis is not reduced or eliminated in such taxable year of the CFC (because, for example, the buyer is a CFC that is a related party) and, as a result, the disqualified basis thereafter gives rise to an additional basis benefit amount, then no portion of the additional basis benefit amount is assigned to a taxable year of any section 245A shareholder.

(iv) *Successor rules for basis benefit accounts.* To the extent that an extraordinary disposition account of a section 245A shareholder is adjusted pursuant to § 1.245A-5(c)(4), a basis benefit account with respect to the extraordinary disposition account is adjusted in a similar manner.

(5) *Special rules regarding duplicate DQB of an item of exchanged basis property—(i) Adjustments to certain rules in applying paragraph (b)(1) of this section.* For purposes of paragraph (b)(1) of this section for a taxable year of a section 245A shareholder, the following rules apply with respect to duplicate DQB of an item of exchanged basis property:

(A) Duplicate DQB of the item of exchanged basis property with respect to an item of specified property to which the item of exchanged property relates is not taken into account for purposes of paragraph (b)(1) of this section if the disqualified basis of the item of specified property is taken into account for purposes of paragraph (b)(1) of this section. Thus, for example, if for a taxable year of a section 245A shareholder the ownership requirement

of paragraph (b)(3) of this section is satisfied with respect to an item of specified property and an item of exchanged basis property that relates to the item of specified property, all of the disqualified basis of which is duplicate DQB with respect to the item of specified property, then only the disqualified basis of the item of specified property is taken into account for purposes of, and is subject to reduction under, paragraph (b)(1) of this section.

(B) If, pursuant to paragraph (b)(5)(i)(A) of this section, duplicate DQB of an item of exchanged basis property with respect to an item of specified property is not taken into account for purposes of paragraph (b)(1) of this section, then, solely for purposes of § 1.951A-2(c)(5), the duplicate DQB of the item of exchanged basis property is reduced (in the same manner as it would be if the disqualified basis were taken into account for purposes of paragraph (b)(1) of this section) by the product of the amounts described in paragraphs (b)(5)(i)(B)(1) and (2) of this section.

(1) The reduction, under paragraph (b)(1) of this section for the taxable year of the section 245A shareholder, to the disqualified basis of the item of specified property to which the item of exchanged basis property relates.

(2) A fraction, the numerator of which is the duplicate DQB of the item of exchanged basis property with respect to the item of specified property, and the denominator of which is the sum of the amounts of duplicate DQB with respect to the item of specified property of each item of exchanged basis property that relates to the item of specified property and for which the ownership requirement of paragraph (b)(3)(i) of this section is satisfied for the taxable year of the section 245A shareholder. For purposes of determining this fraction, duplicate DQB of an item of exchanged basis property is determined pursuant to the rules of paragraph (b)(2)(i) of this section (by replacing the term “paragraph (b)(1)” in that paragraph with the term “paragraph (b)(5)(i)(B)”). In addition, duplicate DQB of an item of exchanged basis property is excluded from the denominator of the fraction to the extent the duplicate DQB is attributable to duplicate DQB of another item of exchanged basis property that is included in the denominator of the fraction.

(ii) *Adjustments to certain rules in applying paragraph (b)(4) of this section.* For purposes of paragraph (b)(4)(i)(A) of this section, to the extent that disqualified basis of an item of

specified property gives rise to a basis benefit amount that is assigned to a taxable year of a section 245A shareholder under paragraph (b)(4)(iii)(A) of this section, and thereafter duplicate DQB attributable to such disqualified basis of the item of specified property gives rise to an additional basis benefit amount, the additional basis benefit amount cannot be assigned to another taxable year of any section 245A shareholder. Similarly, for purposes of paragraph (b)(4)(i)(A) of this section, to the extent that duplicate DQB attributable to disqualified basis of an item of specified property gives rise to a basis benefit amount that is assigned to a taxable year of a section 245A shareholder under paragraph (b)(4)(iii)(A) of this section, and thereafter such disqualified basis of the item of specified property (or duplicate DQB attributable to such disqualified basis of the item of specified property) gives rise to an additional basis benefit amount, the additional basis benefit amount cannot be assigned to another taxable year of any section 245A shareholder.

(6) *Special rule regarding prior extraordinary disposition amounts.* For purposes of paragraph (b)(1) of this section, to the extent that an extraordinary disposition account of a section 245A shareholder is reduced under § 1.245A-5(c)(3)(i)(A) by reason of a prior extraordinary disposition amount described in § 1.245A-5(c)(3)(i)(D)(1)(i) through (iv), the extraordinary disposition account is considered to give rise to an extraordinary disposition amount or tiered extraordinary disposition amount (and the amount by which the account is reduced is treated as an extraordinary disposition amount or tiered extraordinary disposition amount).

(c) *Reduction of extraordinary disposition account by reason of the allocation and apportionment of deductions or losses attributable to disqualified basis—(1) In general.* For a taxable year of a CFC, if there is an RGI account with respect to the CFC that relates to an extraordinary disposition account of a section 245A shareholder with respect to an SFC, and the section 245A shareholder satisfies the ownership requirement of paragraph (c)(5) of this section for the taxable year of the CFC, then, subject to the limitations in paragraphs (c)(6) and (7) of this section, the extraordinary disposition account is reduced (but not below zero) by the lesser of the following amounts (each determined in the functional currency of the CFC)—

- (i) The excess (if any) of—
- (A) The product of—

- (1) The adjusted earnings of the CFC for the taxable year of the CFC; and

- (2) The percentage of stock of the CFC (by value) that, in aggregate, is owned directly or indirectly through one or more specified entities by the section 245A shareholder and any domestic affiliates on the last day of the taxable year of the CFC; over

- (B) The sum of—

- (1) The sum of the balance of the section 245A shareholder's and any domestic affiliates' previously taxed earnings and profits accounts with respect to the CFC for purposes of section 959 (determined as of the end of the taxable year of the CFC and taking into account any adjustments to the accounts for the taxable year);

- (2) The sum of the balance of the hybrid deduction accounts (as described in § 1.245A(e)-1(d)(1)) with respect to shares of stock of the CFC that the section 245A shareholder and any domestic affiliates own (within the meaning of section 958(a), and determined by treating a domestic partnership as foreign) as of the end of the taxable year of the CFC and taking into account any adjustments to the accounts for the taxable year; and

- (3) The sum of the balance of the section 245A shareholder's and any domestic affiliates' extraordinary disposition accounts with respect to the CFC (determined as of the end of the taxable year of the CFC and taking into account any adjustments to the accounts for the taxable year). However, if the section 245A shareholder or a domestic affiliate has an RGI account with respect to the CFC that relates to an extraordinary disposition account with respect to the CFC, then only the excess, if any, of the balance of the extraordinary disposition account over the balance of the RGI account that relates to the extraordinary disposition account (determined as of the end of the taxable year of the CFC, but without regard to the application of paragraph (c)(4)(i)(B) of this section for the taxable year) is taken into account for purposes of this paragraph (c)(1)(i)(B)(3). In addition, for purposes of this paragraph (c)(1)(i)(B)(3), an extraordinary disposition account that but for paragraph (e)(1) of this section would be with respect to the CFC for purposes of this section is treated as an extraordinary disposition account with respect to the CFC and thus is taken into account for purposes of this paragraph (c)(1)(i)(B)(3).

- (ii) The balance of the RGI account with respect to the CFC that relates to the section 245A shareholder's extraordinary disposition account with respect to the SFC (determined as of the

end of the taxable year of the CFC, but without regard to the application of paragraph (c)(4)(i)(B) of this section for the taxable year).

(2) *Timing of reduction to extraordinary disposition account.* See § 1.245A-9(b)(3) for timing rules regarding the reduction to an extraordinary disposition account.

(3) *Adjusted earnings.* The term *adjusted earnings* means, with respect to a CFC and a taxable year of the CFC, the earnings and profits of the CFC, determined as of the end of the CFC's taxable year (taking into account all distributions during the taxable year, and not taking into account any deficit in earnings and profits subject to § 1.381(c)(2)-1(a)(5)) and with the adjustments described in paragraphs (c)(3)(i) through (iv) of this section.

(i) The earnings and profits are increased by the amount of any deduction or loss that—

- (A) Is or was attributable to disqualified basis of an item of specified property, but only to the extent that gain recognized on the extraordinary disposition of the item of specified property was included in the initial balance of an extraordinary disposition account;

- (B) Is or was allocated and apportioned to residual CFC gross income of the CFC (or a predecessor) solely by reason of § 1.951A-2(c)(5)(i); and

- (C) Does not or has not given rise to or increased a deficit in earnings and profits subject to § 1.381(c)(2)-1(a)(5), determined as of the end of the taxable year of the CFC.

(ii) The earnings and profits are decreased by the amount by which any RGI account with respect to the CFC has been decreased pursuant to paragraph (c)(4)(i)(B) of this section for a prior taxable year of the CFC.

(iii) The earnings and profits are determined without regard to earnings attributable to income described in section 245(a)(5)(A) or dividends described in section 245(a)(5)(B) (determined without regard to section 245(a)(12)).

(iv) The earnings and profits are decreased by the amount of any deduction or loss that, but for paragraph (c)(3)(i)(C) of this section, would be described in paragraph (c)(3)(i) of this section.

(4) *RGI account—(i) In general.* For a taxable year of a CFC, the following rules apply to determine the balance of a section 245A shareholder's RGI account that is with respect to the CFC and that relates to an extraordinary disposition account of the section 245A shareholder with respect to an SFC:

(A) The balance of the RGI account is increased by the product of the amounts described in paragraphs (c)(4)(i)(A)(1) and (2) of this section for a taxable year of the CFC.

(1) The sum of the amounts of deductions and losses of the CFC that—

(i) Are attributable to disqualified basis of one or more items of specified property that correspond to the extraordinary disposition account; and

(ii) But for § 1.951A-2(c)(5)(i), would have decreased one or more categories of the CFC's positive subpart F income, the CFC's tested income, or the CFC's ECTI, or increased or given rise to a tested loss or one or more qualified deficits of the CFC.

(2) The lesser of—

(i) A fraction (expressed as a percentage), the numerator of which is the sum of the portions of the CFC's subpart F income and tested income or tested loss (expressed as a positive number) taken into account under sections 951(a)(1)(A) and 951A(a) (as determined under the rules of §§ 1.951-1(b) and (e) and 1.951A-1(d)) by the section 245A shareholder and any domestic affiliates of the section 245A shareholder and the section 245A shareholder's and any domestic affiliates' pro rata shares of the CFC's qualified deficits (expressed as a positive number), and the denominator of which is the sum of the CFC's subpart F income, tested income or tested loss (expressed as a positive number), and qualified deficits (expressed as a positive number), but for purposes of this paragraph (c)(4)(i)(A)(2)(i) treating ECTI (expressed as a positive number) as if it were subpart F income; and

(ii) The extraordinary disposition ownership percentage applicable as to the section 245A shareholder's extraordinary disposition account.

(B) The balance of the RGI account is decreased to the extent that, by reason of the application of paragraph (c)(1) of this section with respect to the taxable year of the CFC, there is a reduction to the extraordinary disposition account of the section 245A shareholder.

(ii) *Successor rules for RGI accounts.* To the extent that an extraordinary disposition account of a section 245A shareholder is adjusted pursuant to § 1.245A-5(c)(4), an RGI account of a CFC with respect to the extraordinary disposition account is adjusted in a similar manner.

(5) *Ownership requirement with respect to a CFC.* For a taxable year of a CFC, a section 245A shareholder satisfies the ownership requirement of this paragraph (c)(5) if, on the last day of the CFC's taxable year, the section 245A shareholder or a domestic affiliate

is a United States shareholder with respect to the CFC.

(6) *Allocation of reductions among multiple extraordinary disposition accounts.* This paragraph (c)(6) applies if, by reason of the application of paragraph (c)(1) of this section with respect to a taxable year of a CFC (and but for the application of this paragraph (c)(6) and paragraph (c)(7) of this section), the sum of the reductions under paragraph (c)(1) of this section to two or more extraordinary disposition accounts of a section 245A shareholder or a domestic affiliate of the section 245A shareholder would exceed the amount described in paragraph (c)(1)(i)(A) of this section (the amount of such excess, the *excess amount*). When this paragraph (c)(6) applies, the reduction to each extraordinary disposition account described in the previous sentence is equal to the reduction that would occur but for this paragraph (c)(6) and paragraph (c)(7) of this section, less the product of the excess amount and a fraction, the numerator of which is the balance of the extraordinary disposition account, and the denominator of which is the sum of the balances of all of the extraordinary dispositions accounts described in the previous sentence. For purposes of determining this fraction, the balance of an extraordinary disposition account is determined as of the end of the taxable year of the section 245A shareholder or the domestic affiliate, as applicable, that includes the date on which the CFC's taxable year ends (and after the determination of any extraordinary disposition amounts or tiered extraordinary disposition amounts for the taxable year of the section 245A shareholder or the domestic affiliate, as applicable, and adjustments to the extraordinary disposition account for prior extraordinary disposition amounts).

(7) *Extraordinary disposition account not reduced below balance of basis benefit account.* An extraordinary disposition account of a section 245A shareholder cannot be reduced pursuant to paragraph (c)(1) of this section below the balance of the basis benefit account with respect to the extraordinary disposition account (determined when a reduction to the extraordinary disposition account would occur under paragraph (c)(1) of this section).

(d) *Special rules for determining when specified property corresponds to an extraordinary disposition account—*(1) *Substituted property—*(i) *Treatment as specified property that corresponds to an extraordinary disposition account.* For purposes of this section, an item of substituted property is treated as an

item of specified property that corresponds to an extraordinary disposition account to which the related item of specified property (that is, the item of specified property to which the item of substituted property relates, as described in paragraph (d)(1)(ii) of this section) corresponds. In addition, in a case in which an item of substituted property relates to an item of specified property that corresponds to a particular extraordinary disposition account and an item of specified property that corresponds to another extraordinary disposition account (such that, pursuant to this paragraph (d)(1)(i), the item of substituted property is treated as corresponding to multiple extraordinary disposition accounts), only the disqualified basis of the item of substituted property attributable to the first item of specified property is taken into account for purposes of applying this section as to the first extraordinary disposition account, and, similarly, only the disqualified basis of the item of substituted property attributable to the second item of specified property is taken into account for purposes of applying this section as to the second extraordinary disposition account.

(ii) *Definition of substituted property.* The term *substituted property* means an item of property the disqualified basis of which is, pursuant to § 1.951A-3(h)(2)(ii)(B)(2)(i) or (iii), increased by reason of a reduction under § 1.951A-3(h)(2)(ii)(B)(1) in disqualified basis of an item of specified property. An item of substituted property relates to an item of specified property if the disqualified basis of the item of substituted property was increased by reason of a reduction in disqualified basis of the item of specified property.

(2) *Exchanged basis property—*(i) *Treatment as specified property that corresponds to an extraordinary disposition account for certain purposes.* For purposes of this section, an item of exchanged basis property is treated as an item of specified property that corresponds to an extraordinary disposition account to which the related item of specified property (that is, the item of specified property to which the item of exchanged basis property relates) corresponds.

(ii) *Definition of exchanged basis property.* The term *exchanged basis property* means an item of property the disqualified basis of which, pursuant to § 1.951A-3(h)(2)(ii)(B)(2)(ii), includes disqualified basis of an item of specified property. An item of exchanged basis property relates to an item of specified property if the disqualified basis of the item of exchanged basis property

includes disqualified basis of the item of specified property.

(iii) *Definition of duplicate DQB*—(A) *In general.* The term *duplicate DQB* means, with respect to an item of exchanged basis property and the item of specified property to which the exchanged basis property relates, the disqualified basis of the item of exchanged basis property that includes or is attributable to disqualified basis of the item of specified property.

(B) *Certain nonrecognition transfers involving stock or a partnership interest.* To the extent that an item of exchanged basis property that is stock or an interest in a partnership (*lower-tier item*) includes disqualified basis of an item of specified property to which the lower-tier item relates (*contributed item*), and another item of exchanged basis property that is stock or a partnership interest (*upper-tier item*) includes disqualified basis of the lower-tier item that is attributable to disqualified basis of the contributed item, the disqualified basis of the upper-tier item is attributable to disqualified basis of the contributed item and the upper-tier item is an item of exchanged basis property that relates to the contributed item. The principles of the preceding sentence apply each time disqualified basis of an item of exchanged basis property that is stock or an interest in a partnership is included in disqualified basis of another item of exchanged basis property that is stock or an interest in a partnership.

(C) *Multiple nonrecognition transfers of an item of specified property.* To the extent that multiple items of exchanged basis property that are stock or interests in a partnership include disqualified basis of the same item of specified property (*contributed item*) to which the items of exchanged basis property relate, and the issuer of one of the items of exchanged basis property (*upper-tier successor item*) receives the other item of exchanged basis property (*lower-tier successor item*) in exchange for the contributed property, the disqualified basis of the upper-tier successor item is attributable to disqualified basis of the lower-tier successor item and the upper-tier successor item is an item of exchanged basis property that relates to the lower-tier successor item. The principles of the preceding sentence apply each time disqualified basis of an item of specified property to which an item of exchanged basis property that is stock or an interest in partnership relates is included in disqualified basis of another item of exchanged basis property that is stock or an interest in a partnership.

(e) *Special rules when extraordinary disposition accounts are adjusted*

pursuant to § 1.245A-5(c)(4)—(1) *Extraordinary disposition account with respect to multiple SFCs.* This paragraph (e)(1) applies if, pursuant to § 1.245A-5(c)(4)(ii) or (iii) (the transaction or transactions by reason of which § 1.245A-5(c)(4)(ii) or (iii) applies, the *adjustment transaction*), an extraordinary disposition account of a section 245A shareholder with respect to an SFC (such extraordinary disposition account, the *transferor ED account*; and such SFC, the *transferor SFC*) gives rise to an increase in the balance of an extraordinary disposition account with respect to another SFC (such extraordinary disposition account, the *transferee ED account*; such SFC, the *transferee SFC*; and such increase, the *adjustment amount*). When this paragraph (e)(1) applies, the following rules apply for purposes of this section:

(i) A ratable portion of the transferee ED account is treated as retaining its status as an extraordinary disposition account with respect to the transferor SFC and is not treated as an extraordinary disposition account with respect to the transferee SFC (the transferee ED account to such extent, the *deemed transferor ED account*), based on the adjustment amount relative to the balance of the transferee ED account (without regard to this paragraph (e)(1)) immediately after the adjustment transaction. Thus, for example, whether or not the transferor SFC is in existence immediately after the transaction, the items of specified property that correspond to the deemed transferor ED account are the same as the items of specified property that correspond to the transferor ED account. As an additional example, whether or not the transferor SFC is in existence immediately after the transaction the extraordinary disposition ownership percentage with respect to the deemed transferor ED account is the same as the extraordinary disposition ownership percentage with respect to the transferor ED account (except to the extent the extraordinary disposition ownership percentage is adjusted pursuant to the rules of paragraph (e)(2) of this section).

(ii) In the case of an amount (such as an extraordinary disposition amount or tiered extraordinary disposition amount) determined by reference to the transferee ED account (without regard to this paragraph (e)(1)), the portion of the amount that is considered attributable to the deemed transferor ED account (and not the transferee ED account) is equal to the product of such amount and a fraction, the numerator of which is the balance of the deemed transferor ED account, and the denominator of which is the balance of the transferee ED

account (determined without regard to this paragraph (e)(1)). Thus, for example, if after an adjustment transaction the transferee ED account (without regard to this paragraph (e)(1)) gives rise to an extraordinary disposition amount, and if the fraction (expressed as a percentage) is 40, then, for purposes of this section, 40 percent of the extraordinary disposition amount is treated as attributable to the deemed transferor ED account and the remaining 60 percent of the extraordinary disposition amount is attributable to the transferee ED account, and the balance of each of the deemed transferor ED account and the transferee ED account is correspondingly reduced.

(2) *Extraordinary disposition accounts with respect to a single SFC.* If an extraordinary disposition account of a section 245A shareholder with respect to an SFC is reduced by reason of § 1.245A-5(c)(4), then, except as provided in paragraph (e)(1) of this section, for purposes of this section, the extraordinary disposition ownership percentage as to the extraordinary disposition account (as well as the extraordinary disposition ownership percentage as to any extraordinary disposition account with respect to the SFC that is increased by reason of the reduction) is adjusted in a similar manner.

#### § 1.245A-9 Other rules and definitions.

(a) *In general.* This section provides rules of general applicability for purposes of §§ 1.245A-6 through 1.245A-10, a transition rule to revoke an election to eliminate disqualified basis, and definitions.

(b) *Rules of general applicability*—(1) *Correspondence.* An item of specified property corresponds to a section 245A shareholder's extraordinary disposition account if gain was recognized on the extraordinary disposition of the item and the gain was taken into account in determining the initial balance of the account. See § 1.245A-8(d) for additional rules regarding when an item of property is treated as corresponding to an extraordinary disposition account in certain complex cases.

(2) *Timing rules related to disqualified basis for purposes of applying §§ 1.245A-7(b) and 1.245A-8(b)*—(i) *Determination of disqualified basis.* For purposes of determining the fraction described in § 1.245A-7(b)(1)(ii) or § 1.245A-8(b)(1)(ii) when applying § 1.245A-7(b)(1) or § 1.245A-8(b)(1)(ii), respectively, for a taxable year of a section 245A shareholder, disqualified basis of an item of specified property is determined as of the beginning of the taxable year of the CFC that holds the

item of specified property (in a case in which § 1.245A-7(b) applies) or the specified property owner (in a case in which § 1.245A-8(b) applies), in either case, that includes the date on which the section 245A shareholder's taxable year ends (and without regard to any reductions to the disqualified basis of the item of specified property pursuant to § 1.245A-7(b)(1) or § 1.245A-8(b)(1) for such taxable year of the CFC or the specified property owner, as applicable). However, if disqualified basis of the item of specified property arose as a result of an extraordinary disposition that occurred after the beginning of the taxable year of the CFC or the specified property owner described in the preceding sentence, then the disqualified basis of the item of specified property is determined as of the date on which the extraordinary disposition occurred (and without regard to any reductions to the disqualified basis of the item of specified property pursuant to paragraph (b)(1) of this section for such taxable year of the CFC or the specified property owner).

(ii) *Reduction to disqualified basis of an item of specified property.* The reduction to disqualified basis of an item of specified property pursuant to § 1.245A-7(b)(1) or § 1.245A-8(b)(1) occurs on the date described in paragraph (b)(2)(i) of this section.

(iii) *Definition of specified property owner.* For purposes of applying § 1.245A-8(b)(1) and paragraphs (b)(2)(i) and (ii) of this section for a taxable year of a section 245A shareholder, the term *specified property owner* means, with respect to an item of specified property, the person that, on at least one day of the taxable year of the person that includes the date on which the section 245A shareholder's taxable year ends, held the item of specified property. However, if, but for this sentence, there would be more than one specified property owner with respect to the item of specified property, then the specified property owner is the person that held the item of specified property on the earliest date that falls within the section 245A shareholder's taxable year.

(3) *Timing rules for reducing an extraordinary disposition account under §§ 1.245A-7(c) and 1.245A-8(c).* For purposes of § 1.245A-7(c)(1) or § 1.245A-8(c)(1), as applicable, with respect to a taxable year of a CFC, the reduction to an extraordinary disposition account pursuant to § 1.245A-7(c)(1) or § 1.245A-8(c)(1) occurs as of the end of the taxable year of the section 245A shareholder that includes the date on which the CFC's taxable year ends (and after the

determination of any extraordinary disposition amounts or tiered extraordinary amounts, adjustments to the extraordinary disposition account for prior extraordinary disposition amounts, and the application of § 1.245A-7(b) or § 1.245A-8(b), as applicable, each for the taxable year of the section 245A shareholder).

(4) *Currency translation.* For purposes of applying §§ 1.245A-7(b) and 1.245A-8(b), the disqualified basis of (and, if applicable, a basis benefit amount with respect to) an item of specified property that corresponds to an extraordinary disposition account are translated (if necessary) into the functional currency in which the extraordinary disposition account is maintained, using the spot rate on the date the extraordinary disposition occurred. A reduction in disqualified basis of an item of specified property determined under § 1.245A-7(b)(1) or § 1.245A-8(b)(1) is translated (if necessary) into the functional currency in which the disqualified basis of the item of specified property is maintained, and a reduction in an extraordinary disposition account determined under § 1.245A-7(c) or § 1.245A-8(c) section is translated (if necessary) into the functional currency in which the extraordinary disposition account is maintained, in each case using the spot rate described in the preceding sentence.

(5) *Anti-avoidance rule.* Appropriate adjustments are made pursuant to this paragraph (b)(5), including adjustments that would disregard a transaction or arrangement in whole or in part, to any amounts determined under (or subject to application of) this section if a transaction or arrangement is engaged in with a principal purpose of avoiding the purposes of §§ 1.245A-6 through 1.245A-10.

(c) *Transition rule to revoke election to eliminate disqualified basis—(1) In general.* This paragraph (c)(1) applies to an election that is filed, pursuant to § 1.951A-3(h)(2)(ii)(B)(3), to eliminate the disqualified basis of an item of specified property. An election to which this paragraph (c)(1) applies may be revoked if, on or before March 1, 2021—

(i) All controlling domestic shareholders (as defined in § 1.964-1(c)(5)) of the CFC (or, in the case of an election made by a partnership, the partnership) each attach a revocation statement (in the manner described in paragraph (c)(2) of this section) to an amended return, for the taxable year to which the election applies, that revokes the election (or, in the case of a partnership subject to subchapter C of chapter 63 of the Internal Revenue

Code, requests administrative adjustment under section 6227); and

(ii) The controlling domestic shareholders (or the partnership) each file an amended tax return, for any other taxable years reflecting the election to eliminate the disqualified basis, that reflects the election having been revoked (or, in the case of a partnership subject to subchapter C of chapter 63, requests administrative adjustment under section 6227).

(2) *Revocation statement.* Except as otherwise provided in publications, forms, instructions, or other guidance, a revocation statement attached by a person to an amended tax return must include the person's name, taxpayer identification number, and a statement that the revocation statement is filed pursuant to paragraph (c)(1) of this section to revoke an election pursuant to § 1.951A-3(h)(2)(ii)(B)(3). In addition, the revocation statement must be filed in the manner prescribed in publications, forms, instructions, or other guidance.

(d) *Definitions.* In addition to the definitions in § 1.245A-5, the following definitions apply for purposes of §§ 1.245A-6 through 1.245A-11.

(1) The term *adjusted earnings* has the meaning provided in § 1.245A-7(c)(3) or § 1.245A-8(c)(3), as applicable.

(2) The term *basis benefit account* has the meaning provided in § 1.245A-8(b)(4)(i).

(3) The term *basis benefit amount* has the meaning provided in § 1.245A-8(b)(4)(ii).

(4) The term *disqualified basis* has the meaning provided in § 1.951A-3(h)(2)(ii).

(5) The term *domestic affiliate* means, with respect to a section 245A shareholder, a domestic corporation that is a related party with respect to the section 245A shareholder. *See also* § 1.245A-5(i)(19) (defining related party).

(6) The term *duplicate DQB* has the meaning provided in § 1.245A-8(d)(2)(iii).

(7) The term *ECTI* means, with respect to a taxable year of a specified foreign person, the taxable income (or loss) of the specified foreign person determined by taking into account only items of income and gain that are, or are treated as, effectively connected with the conduct of a trade or business in the United States (as described in § 1.882-4(a)(1)) and are not exempt from U.S. tax pursuant to a treaty obligation of the United States, and items of deduction and loss that are allocated and apportioned to such items of income and gain.

(8) The term *exchanged basis property* has the meaning provided in § 1.245A–8(d)(2)(ii).

(9) The term *qualified deficit* has the meaning provided in section 952(c)(1)(B)(ii).

(10) The term *qualified related party* has the meaning provided in § 1.245A–8(b)(3)(ii).

(11) The term *RGI account* means, with respect to a CFC and an extraordinary disposition account of a section 245A shareholder with respect to an SFC, an account of the section 245A shareholder with respect to an SFC (the initial balance of which is zero), adjusted at the end of each taxable year of the CFC pursuant to the rules of § 1.245A–7(c)(4) or § 1.245A–8(c)(4), as applicable. The RGI account must be maintained in the functional currency of the CFC.

(12) The term *specified foreign person* means a nonresident alien individual (as defined in section 7701(b) and the regulations under section 7701(b)) or a foreign corporation (including a CFC) that conducts, or is treated as conducting, a trade or business in the United States (as described in § 1.882–4(a)(1)).

(13) The term *specified property owner* has the meaning provided in § 1.245A–8(b)(2)(iii).

(14) The term *subpart F income* has the meaning provided in section 952(a).

(15) The term *substituted property* has the meaning provided in § 1.245A–8(d)(1)(ii).

(16) The term *tested income* has the meaning provided in section 951A(c)(2)(A).

(17) The term *tested loss* has the meaning provided in section 951A(c)(2)(B).

#### § 1.245A–10 Examples.

(a) *Scope.* This section provides examples illustrating the application of §§ 1.245A–6 through 1.245A–9.

(b) *Presumed facts.* For purposes of the examples in the section, except as otherwise stated, the following facts are presumed:

(1) US1 and US2 are both domestic corporations that have calendar taxable years.

(2) CFC1, CFC2, CFC3, and CFC4 are all SFCs and CFCs that have taxable years ending November 30.

(3) Each entity uses the U.S. dollar as its functional currency.

(4) There are no items of deduction or loss attributable to an item of specified property.

(5) Absent the application of § 1.245A–5, any dividends received by US1 from CFC1 would meet the requirements to qualify for the section 245A deduction.

(6) All dispositions of items of specified property by an SFC during a disqualified period of the SFC to a related party give rise to an extraordinary disposition.

(7) None of the CFCs have a deficit subject to § 1.381(c)(2)–1(a)(5), and none of the CFCs are engaged in the conduct of a trade or business in the United States (and therefore none of the CFCs have ECTI).

(8) There is no previously taxed earnings and profits account with respect to any CFC for purposes of section 959. In addition, each hybrid deduction account with respect to a share of stock of a CFC has a zero balance at all times. Further, there is no extraordinary disposition account with respect to any CFC.

(9) Under § 1.245A–11(b), taxpayers choose to apply §§ 1.245A–6 through 1.245A–11 to the relevant taxable years.

(c) *Examples—(1) Example 1. Reduction of disqualified basis under rule for simple cases by reason of dividend paid out of extraordinary disposition account—(i) Facts.* US1 owns 100% of the single class of stock of CFC1 and CFC2. On November 30, 2018, in a transaction that is an extraordinary disposition, CFC1 sells two items of specified property, Item 1 and Item 2, to CFC2 in exchange for \$150x of cash (the “Disqualified Transfer”). Item 1 is sold for \$90x and Item 2 is sold for \$60x. Item 1 and Item 2 each has a basis of \$0 in the hands of CFC1 immediately before the Disqualified Transfer, and therefore CFC1 recognizes \$150x of gain as a result of the Disqualified Transfer (\$150x – \$0). After the Disqualified Transfer, CFC2’s only assets are Item 1 and Item 2. On November 30, 2018, and thus during US1’s taxable year ending December 31, 2018, CFC1 distributes \$150x of cash to US1, and all of the distribution is characterized as a dividend under section 301(c)(1) and treated as a distribution out of earnings and profits described in section 959(c)(3). For CFC1’s taxable year ending on November 30, 2018, CFC1 has \$160x of earnings and profits described in section 959(c)(3), without regard to any distributions during the taxable year. CFC2 continues to hold Item 1 and Item 2. Lastly, because the conditions of § 1.245A–6(b)(1) and (2) are satisfied for US1’s 2018 taxable year, US1 chooses to apply § 1.245A–7 (rules for simple cases) in lieu of § 1.245A–8 (rules for complex cases) for that taxable year.

(ii) *Analysis—(A) Application of §§ 1.245A–5 and 1.951A–2 as a result of the Disqualified Transfer.* As a result of the Disqualified Transfer, under § 1.951A–2(c)(5), Item 1 has disqualified basis of \$90x, and Item 2 has disqualified basis of \$60x. In addition, as a result of the Disqualified Transfer, under § 1.245A–5(c)(3)(i)(A), US1 has an extraordinary disposition account with respect to CFC1 with an initial balance of \$150x. Under § 1.245A–5(c)(2)(i), \$10x of the dividend is considered paid out of non-extraordinary disposition E&P of CFC1 with respect to US1, and \$140x of the dividend is

considered paid out of US1’s extraordinary disposition account with respect to CFC1 to the extent of the balance of the extraordinary disposition account (\$150x). Thus, the dividend of \$150x is an extraordinary disposition amount, within the meaning of § 1.245A–5(c)(1), to the extent of \$140x. As a result, the balance of the extraordinary disposition account is reduced to \$10x (\$150x – \$140x).

(B) *Correspondence requirement.* Under § 1.245A–9(b)(1), each of Item 1 and Item 2 corresponds to US1’s extraordinary disposition account with respect to CFC1, because as a result of the Disqualified Transfer CFC1 recognized gain with respect to Item 1 and Item 2, and the gain was taken into account in determining the initial balance of US1’s extraordinary disposition account with respect to CFC1.

(C) *Reduction of disqualified basis of Item 1.* Because Item 1 corresponds to US1’s extraordinary disposition account, the disqualified basis of Item 1 is reduced pursuant to § 1.245A–7(b)(1) by reason of US1’s \$140x extraordinary disposition amount for US1’s 2018 taxable year. Paragraphs (c)(2)(ii)(C)(1) through (3) of this section describe the determinations pursuant to § 1.245A–7(b)(1).

(1) To determine the reduction to the disqualified basis of Item 1, the disqualified basis of Item 1, as well as the disqualified basis of Item 2, must be determined as of the date described in § 1.245A–9(b)(2)(i) (and before the application of § 1.245A–7(b)(1)). See § 1.245A–7(b)(1)(ii). For each of Item 1 and Item 2, that date is December 1, 2018. December 1, 2018, is the first day of the taxable year of CFC2 (the CFC that holds Item 1 and Item 2) beginning on December 1, 2018, which is the taxable year of CFC2 that includes December 31, 2018, the date on which US1’s 2018 taxable year ends. See § 1.245A–9(b)(2)(i).

(2) Pursuant to § 1.245A–7(b)(1), the disqualified basis of Item 1 is reduced by \$84x, computed as the product of—

(i) \$140x, the extraordinary disposition amount; and

(ii) A fraction, the numerator of which is \$90x (the disqualified basis of Item 1 on December 1, 2018, and before the application of § 1.245A–7(b)(1)), and the denominator of which is \$150x (the disqualified basis of Item 1, \$90x, plus the disqualified basis of Item 2, \$60x, in each case determined on December 1, 2018, and before the application of § 1.245A–7(b)(1)). See § 1.245A–7(b)(1).

(3) The \$84x reduction to the disqualified basis of Item 1 occurs on December 1, 2018, the date on which the disqualified basis of Item 1 is determined for purposes of determining the reduction pursuant to § 1.245A–7(b)(1). See § 1.245A–9(b)(2)(ii).

(D) *Reduction of disqualified basis of Item 2.* For reasons similar to those described in paragraph (c)(2)(ii)(C) of this section, on December 1, 2018, the disqualified basis of Item 2 is reduced by \$56x, the amount equal to the product of \$140x, the extraordinary disposition amount, and a fraction, the numerator of which is \$60x (the disqualified basis of Item 2 on December 1, 2018, and before the application of § 1.245A–7(b)(1)), and the denominator of which is \$150x (the



disqualified basis of Item 1, \$90x, plus the disqualified basis of Item 2, \$60x, in each case determined on December 1, 2018, and before the application of § 1.245A-7(b)(1)).

(2) *Example 2. Basis benefit amount and impact on reduction to disqualified basis under rule for complex cases*—(i) *Facts*. The facts are the same as in paragraph (c)(1)(i) of this section (*Example 1*) (and the results are the same as in paragraph (c)(1)(ii)(A) of this section), except that, on December 1, 2018, CFC2 sells Item 1 for \$90x of cash to an individual that is not a related party with respect to US1 or CFC2 (such transaction, the “Sale,” and such individual, “Individual A”). At the time of the Sale, CFC2’s basis in Item 1 is \$90x (all of which is disqualified basis, as described in § 1.951A-3(h)(2)(ii)(A)). CFC2 takes into the account the disqualified basis of Item 1 for purposes of determining the amount of gain recognized on the Sale, which is \$0 (\$90x – \$90x); but for the disqualified basis, CFC2 would have had \$90x of gain that would have been taken into account in computing its tested income. As a result of the Sale, the condition of § 1.245A-6(b)(2) is not satisfied, because on at least one day of CFC2’s taxable year beginning on December 1, 2018 (which begins within US1’s 2018 taxable year) CFC2 does not hold Item 1. See § 1.245A-6(b)(2)(ii)(C)(1). US1 therefore applies § 1.245A-8 (rules for complex cases) for its 2018 taxable year. See § 1.245A-6(b).

(ii) *Analysis*—(A) *Ownership requirement*. With respect to each of Item 1 and Item 2, the ownership requirement of § 1.245A-8(b)(3)(i) is satisfied for US1’s 2018 taxable year. This is because on at least one day that falls within US1’s 2018 taxable year, each of Item 1 and Item 2 is held by CFC2, and US1 directly owns all of the stock of CFC2 throughout such taxable year (and thus, for purposes of applying § 1.245A-8(b)(3)(i), US1 owns at least 10% of the interests of CFC2 on at least one day that falls within such taxable year). See § 1.245A-8(b)(3).

(B) *Basis benefit amount with respect to Item 1 as a result of the Sale*. Under § 1.245A-8(b)(4)(i), US1 has a basis benefit account with respect to its extraordinary disposition account with respect to CFC1. As described in paragraphs (c)(2)(ii)(B)(1) through (3) of this section, the balance of the basis benefit account (which is initially zero) is, on December 31, 2018, increased by \$90x, the basis benefit amount with respect to Item 1 and assigned to US1’s 2018 taxable year.

(1) By reason of the Sale, for CFC2’s taxable year beginning December 1, 2018, and ending November 30, 2019, the entire \$90x of disqualified basis of Item 1 is taken into account for U.S. tax purposes by CFC2 and, as a result, reduces CFC2’s tested income or increases CFC2’s tested loss. Accordingly, for such taxable year, there is a \$90x basis benefit amount with respect to Item 1. See § 1.245A-8(b)(4)(ii)(A). The result would be the same if the Sale were to a related person and thus, pursuant to § 1.951A-3(h)(2)(ii)(B)(1)(ii), no portion of the \$90x of disqualified basis were eliminated or reduced by reason of the Sale. See § 1.245A-8(b)(4)(ii)(B).

(2) The \$90x basis benefit amount with respect to Item 1 is assigned to US1’s 2018

taxable year. This is because the ownership requirement of § 1.245A-8(b)(3)(i) is satisfied with respect to Item 1 for US1’s 2018 taxable year, and the basis benefit amount occurs in CFC2’s taxable year beginning December 1, 2018, a taxable year of CFC2 that begins within US1’s 2018 taxable year (and, but for § 1.245A-8(b)(4)(iii)(A)(2)(ii), the basis benefit amount would not be assigned to a taxable year of US1, such as the taxable year of US1 beginning January 1, 2019, given that, as result of the Sale, the ownership requirement of § 1.245A-8(b)(3)(i) would not be satisfied with respect to Item 1 for such taxable year). See § 1.245A-8(b)(4)(iii)(A).

(3) On December 31, 2018 (the last day of US1’s 2018 taxable year), US1’s basis benefit account with respect to its extraordinary disposition account with respect to CFC1 is increased by \$90x, the \$90x basis benefit amount with respect to Item 1 and assigned to US1’s 2018 taxable year. The basis benefit account is increased by such amount because Item 1 corresponds to US1’s extraordinary disposition account with respect to CFC1, and the extraordinary disposition ownership percentage applicable to such extraordinary disposition account is 100. See § 1.245A-8(b)(4)(i)(A).

(C) *Basis benefit amount limitation on reduction to disqualified basis*. By reason of US1’s \$140x extraordinary disposition amount for US1’s 2018 taxable year, the disqualified basis of Item 1 is reduced by \$30x, and the disqualified basis of Item 2 is reduced by \$20x, pursuant to § 1.245A-8(b)(1). See § 1.245A-8(b). Paragraphs (c)(2)(ii)(C)(1) through (4) of this section describe the determinations pursuant to § 1.245A-8(b)(1).

(1) For purposes of determining the reduction to the disqualified bases of Item 1 and Item 2, the disqualified bases of the Items are determined on December 1, 2018 (and before the application of § 1.245A-8(b)(1)). See § 1.245A-8(b)(1)(ii). The disqualified bases of the Items are determined on December 1, 2018, because that date is the first day of the taxable year of CFC2 beginning on December 1, 2018, which is the taxable year of CFC2 (the specified property owner of each of Item 1 and Item 2) that includes December 31, 2018, the date on which US1’s 2018 taxable year ends. See § 1.245A-8(b)(2)(i). For purposes of applying §§ 1.245A-8(b)(1) and § 1.245A-9(b)(2) for US1’s 2018 taxable year, CFC2 is the specified property owner of each of Item 1 and Item 2 because, on at least one day of CFC2’s taxable year that includes the date on which US1’s 2018 taxable year ends (that is, on at least one day of CFC2’s taxable year beginning December 1, 2018), CFC2 held the Item. See § 1.245A-9(b)(2)(iii). CFC2 is the specified property owner of Item 1 even though Individual A also held Item 1 during Individual A’s taxable year that includes the date on which US1’s 2018 taxable year ends because CFC2 held Item 1 on an earlier date than Individual A. See § 1.245A-9(b)(2)(iii).

(2) Pursuant to § 1.245A-8(b)(1), the disqualified basis of Item 1 is reduced by \$30x, computed as the product of—

(i) \$50x, the excess of the extraordinary disposition amount (\$140x) over the balance of the basis benefit account with respect to

US1’s extraordinary disposition with respect to CFC1 (\$90x); and

(ii) A fraction, the numerator of which is \$90x (the disqualified basis of Item 1 on December 1, 2018, and before the application of § 1.245A-8(b)(1)), and the denominator of which is \$150x (the disqualified basis of Item 1, \$90x, plus the disqualified basis of Item 2, \$60x, in each case determined on December 1, 2018, and before the application of § 1.245A-8(b)(1)). See paragraph § 1.245A-8(b)(1).

(3) Pursuant to § 1.245A-8(b)(1), the disqualified basis of Item 2 is reduced by \$20x, computed as the product of—

(i) \$50x, the excess of the extraordinary disposition amount (\$140x) over the balance of the basis benefit account with respect to US1’s extraordinary disposition with respect to CFC1 (\$90x); and

(ii) A fraction, the numerator of which is \$60x (the disqualified basis of Item 2 on December 1, 2018, and before the application of paragraph (b)(1) of this section), and the denominator of which is \$150x (the disqualified basis of Item 1, \$90x, plus the disqualified basis of Item 2, \$60x, in each case determined on December 1, 2018, and before the application of § 1.245A-8(b)(1)). See § 1.245A-8(b)(1).

(4) The \$30x and \$20x reductions to the disqualified bases of Item 1 and Item 2, respectively, occur on December 1, 2018, the date on which the disqualified bases of the Items are determined for purposes of determining the reductions pursuant to § 1.245A-8(b)(1). See § 1.245A-9(b)(2)(ii).

(D) *Reduction of basis benefit account*. The balance of the basis benefit account with respect to US1’s extraordinary disposition account with respect to CFC1 is decreased by \$90x, the amount by which, for CFC2’s taxable year beginning December 1, 2018, the disqualified bases of Item 1 and Item 2 would have been reduced pursuant to § 1.245A-8(b)(1) but for the \$90x balance of the basis benefit account. See § 1.245A-8(b)(4)(i)(B). The reduction to the balance of the basis benefit account occurs on December 31, 2018, and after the completion of all other computations pursuant to § 1.245A-8(b). See § 1.245A-8(b)(4)(i)(B).

(3) *Example 3. Reduction in balance of extraordinary disposition account under rules for simple cases by reason of allocation and apportionment of deductions to residual CFC gross income*—(i) *Facts*. The facts are the same as in paragraph (c)(1)(i) of this section (*Example 1*) (and the results are the same as in paragraph (c)(1)(ii)(A) of this section), except that CFC1 does not make a distribution to US1. In addition, during CFC2’s taxable year beginning December 1, 2018, and ending November 30, 2019, the disqualified basis of Item 1 gives rise to a \$6x amortization deduction, and the disqualified basis of Item 2 gives rise to a \$4x amortization deduction, and each of the amortization deductions is allocated and apportioned to residual CFC gross income of CFC2 solely by reason of § 1.951A-2(c)(5) (though, but for § 1.951A-2(c)(5), would have been allocated and apportioned to gross tested income of CFC2). Further, as of the end of CFC2’s taxable year ending November 30, 2019, CFC2 has \$15x of earnings and

profits. Lastly, because the conditions of § 1.245A-6(b)(1) and (2) are satisfied for US1's 2018 taxable year, US1 chooses to apply § 1.245A-7 (rules for simple cases) in lieu of § 1.245A-8 (rules for complex cases) for that taxable year.

(ii) *Analysis.* Pursuant to § 1.245A-7(c)(1), US1's extraordinary disposition account with respect to CFC1 is reduced by the lesser of the amount described in § 1.245A-7(c)(1)(i) with respect to US1, and the RGI account of US1 with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1. See § 1.245A-7(c)(1). Paragraphs (c)(3)(ii)(A) through (D) of this section describe the determinations pursuant to § 1.245A-8(c)(1).

(A) *Computation of adjusted earnings of CFC2, and amount described in § 1.245A-7(c)(1)(i) with respect to US1.* To determine the amount described in § 1.245A-7(c)(1)(i) with respect to US1, the adjusted earnings of CFC2 must be computed for CFC2's taxable year ending November 30, 2019. See § 1.245A-7(c)(1)(i). Paragraphs (c)(3)(ii)(A)(1) and (2) of this section describe these determinations.

(1) The adjusted earnings of CFC2 for its taxable year ending November 30, 2019, is \$25x, computed as \$15x (CFC2's earnings and profits as of November 30, 2019, the last day of that taxable year), plus \$10x (the sum of the \$6x and \$4x amortization deductions of CFC2 for that taxable year, which is the amount of all deductions or losses of CFC2 that is or was attributable to disqualified basis of items of specified property and allocated and apportioned to residual CFC gross income of CFC2 solely by reason of § 1.951A-2(c)(5)(ii)). See § 1.245A-7(c)(3).

(2) For CFC2's taxable year ending November 30, 2019, the amount described in § 1.245A-7(c)(1)(i) with respect to US1 is \$25x, computed as the excess of \$25x (the adjusted earnings) over \$0 (the sum of the balance of the previously taxed earnings and profits accounts with respect to CFC2).

(B) *Increase to balance of RGI account.* Under § 1.245A-9(d)(11), US1 has an RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1. On November 30, 2019 (the last day of CFC2's taxable year), the balance of the RGI account (which is initially zero) is increased by \$10x, the sum of the \$6x and \$4x amortization deductions of CFC2 for its taxable year ending November 30, 2019. See § 1.245A-7(c)(4)(i). Each of the amortization deductions is taken into account for this purpose because, but for § 1.951A-2(c)(5)(i), the deduction would have decreased CFC2's tested income or increased or given rise to a tested loss of CFC2. See § 1.245A-7(c)(4)(i).

(C) *Reduction in balance of extraordinary disposition account.* Pursuant to § 1.245A-7(c)(1), US1's extraordinary disposition account with respect to CFC1 is reduced by \$10x, the lesser of the amount described in § 1.245A-7(c)(1)(i) with respect to US1 for CFC2's taxable year ending November 30, 2019 (\$25x), and the balance of US1's RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1 (\$10x, determined as of November 30, 2019, but without regard to the application of § 1.245A-7(c)(4)(ii) for the

taxable year of CFC2 ending on that date). See § 1.245A-7(c)(1). The \$10x reduction in the balance of US1's extraordinary disposition account occurs on December 31, 2019, the last day of US1's taxable year that includes November 30, 2019 (the last day of CFC2's taxable year). See § 1.245A-9(c)(3).

(D) *Reduction in balance of RGI account.* On November 30, 2019 (the last day of CFC2's taxable year), the balance of US1's RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1 is decreased by \$10x, the amount of the reduction, pursuant to § 1.245A-7(c)(1) section and by reason of the RGI account, to US1's extraordinary disposition account with respect to CFC1. See § 1.245A-7(c)(4)(ii). Therefore, following that reduction, the balance of the RGI account is zero (\$10x - \$10x).

(iii) *Alternative facts in which the reduction is limited by earnings and profits.* The facts are the same as in paragraph (c)(3)(i) of this section (*Example 3*), except that CFC2 has a \$5x deficit in its earnings and profits as of the end of its taxable year ending November 30, 2019. In this case—

(A) The adjusted earnings of CFC2 for its taxable year ending November 30, 2019, is \$5x, computed as - \$5x (CFC2's deficit in earnings and profits as of November 30, 2019) plus \$10x (the sum of the \$6x and \$4x amortization deductions of CFC2), see § 1.245A-7(c)(3);

(B) The amount described in § 1.245A-7(c)(1)(i) with respect to US1 for CFC's taxable year ending November 30, 2019, is \$5x, computed as the excess of \$5x (the adjusted earnings) over \$0 (the sum of the balance of the previously taxed earnings and profits accounts with respect to CFC2), see § 1.245A-7(c)(1)(i);

(C) On December 31, 2019, US1's extraordinary disposition account with respect to CFC1 is reduced by \$5x, the lesser of the amount described in § 1.245A-7(c)(1)(i) with respect to US1 for CFC2's taxable year ending November 30, 2019 (\$5x), and the balance of US1's RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1 (\$10x, determined as of November 30, 2019, but without regard to the application of § 1.245A-8(c)(4)(i)(B) for the taxable year of CFC2 ending on that date), see §§ 1.245A-7(c)(1) and 1.245A-9(c)(3); and

(D) On November 30, 2019 (the last day of CFC2's taxable year), the balance of US1's RGI account with respect to CFC2 is decreased by \$5x (the amount of the reduction, pursuant to § 1.245A-7(c)(1) and by reason of the RGI account, to US1's extraordinary disposition account with respect to CFC1) and, therefore, following such reduction, the balance of the RGI account is \$5x (\$10x - \$5x), see § 1.245A-7(c)(4)(ii).

(4) *Example 4. Reduction to extraordinary disposition accounts limited by § 1.245A-8(c)(6)—(i) Facts.* The facts are the same as in paragraph (c)(3)(iii) of this section (*Example 3*, alternative facts in which the reduction is limited by earnings and profits) (and the results are the same as in paragraph (c)(1)(ii)(A) of this section), except that US1 also owns 100% of the stock of US2, which

owns 100% of the stock of CFC3, and on November 30, 2018, in a transaction that was an extraordinary disposition, CFC3 sold an item of specified property ("Item 3") to CFC2 in exchange for \$200x of cash. Item 3 had a basis of \$0 in the hands of CFC3 immediately before the sale and, therefore, CFC3 recognized \$200x of gain as a result of the sale (\$200x - \$0). Item 3 has \$200x of disqualified basis under § 1.951A-2(c)(5), and US2 has an extraordinary disposition account with respect to CFC3 with an initial balance of \$200x under § 1.245A-5(c)(3)(i)(A). Moreover, during CFC2's taxable year beginning December 1, 2018, and ending November 30, 2019, the disqualified basis of Item 3 gives rise to a \$20x amortization deduction, which is allocated and apportioned to residual CFC gross income of CFC2 solely by reason of § 1.951A-2(c)(5) (though, but for § 1.951A-2(c)(5), would have been allocated and apportioned to gross tested income of CFC2). Further, as of the end of US1's 2018 taxable year, the balance of US1's basis benefit account with respect to its extraordinary disposition account with respect to CFC1 is \$0; similarly, as of the end of US2's 2018 taxable year, the balance of US2's basis benefit account with respect to its extraordinary disposition account with respect to CFC2 is \$0. Because CFC2 holds items of specified property that correspond to more than one extraordinary disposition account (that is, Item 1 and Item 2 correspond to US1's extraordinary disposition account with respect to CFC2, and Item 3 corresponds to US2's extraordinary disposition account with respect to CFC2), the condition of § 1.245A-6(b)(2) is not satisfied. See § 1.245A-6(b)(2)(ii)(C)(3). US1 and US2 therefore apply § 1.245A-8 (rules for complex cases) for their 2018 taxable years.

(ii) *Analysis.* Pursuant to § 1.245A-8(c)(1), US1's extraordinary disposition account with respect to CFC1 is, subject to the limitation in § 1.245A-8(c)(6), reduced by the lesser of the amount described in § 1.245A-8(c)(1)(i) with respect to US1, and the RGI account of US1 with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1. See § 1.245A-8(c)(1). Similarly, US2's extraordinary disposition account with respect to CFC3 is, subject to the limitation in § 1.245A-8(c)(6), reduced by the lesser of the amount described in § 1.245A-8(c)(1)(i) with respect to US2, and the RGI account of US2 with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC3. See § 1.245A-8(c)(1). Paragraphs (c)(4)(ii)(A) through (F) of this section describe the determinations pursuant to § 1.245A-8(c)(1).

(A) *Ownership requirement.* Each of US1 and US2 satisfy the ownership requirement of § 1.245A-8(c)(5) for CFC2's taxable year ending November 30, 2019, because on the last day of that taxable year each is a United States shareholder with respect to CFC2. See § 1.245A-8(c)(5).

(B) *Computation of adjusted earnings of CFC2, and amount described in § 1.245A-8(c)(1)(i) with respect to US1 and US2.* The adjusted earnings of CFC2 for its taxable year ending November 30, 2019, is \$25x, computed as - \$5x (CFC2's deficit in



earnings and profits as of November 30, 2019), plus \$30x (the sum of the \$6x, \$4x, and \$20x amortization deductions of CFC2). See § 1.245A–8(c)(3). For CFC2's taxable year ending November 30, 2019, the amount described in § 1.245A–8(c)(1)(i) with respect to US1 is \$25x, computed as the excess of the product of \$25x (the adjusted earnings) and 100% (the percentage of the stock of CFC2 that US1 and its domestic affiliate, US2, own), over \$0 (the sum of the balance of certain previously taxed earnings and profits accounts and hybrid deduction accounts). See § 1.245A–8(c)(1)(i). Similarly, for CFC2's taxable year ending November 30, 2019, the amount described in § 1.245A–8(c)(1)(i) with respect to US2 is \$25x, computed as the excess of the product of \$25x (the adjusted earnings) and 100% (the percentage of the stock of CFC2 that US2 and its domestic affiliate, US1, own), over \$0 (the sum of the balance of certain previously taxed earnings and profits accounts and hybrid deduction accounts). See § 1.245A–8(c)(1)(i).

(C) *Increase to balance of RGI account.* As described in paragraph (c)(3)(ii)(B) of this section, US1 has an RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1, and the balance of the RGI account is \$10x on November 30, 2019 (the last day of CFC2's taxable year). Similarly, US2 has an RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC3, and the balance of the RGI account is \$20x on November 30, 2019 (reflecting a \$20x increase to the balance of the account for the \$20x amortization deduction of CFC2 for its taxable year ending November 30, 2019). See § 1.245A–8(c)(4)(i).

(D) *Reduction in balance of extraordinary disposition accounts but for § 1.245A–8(c)(6).* But for the application of § 1.245A–8(c)(6), US1's extraordinary disposition account with respect to CFC2 would be reduced by \$10x, which is the lesser of \$25x, the amount described in § 1.245A–8(c)(1)(i) with respect to US1 for CFC2's taxable year ending November 30, 2019, and \$10x, the balance of the RGI account of US1 with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1 (determined as of November 30, 2019, but without regard to the application of § 1.245A–8(c)(4)(i)(B) for the taxable year of CFC2 ending on that date). See § 1.245A–8(c)(1)(i) and (ii). Similarly, but for the application of § 1.245A–8(c)(6), US2's extraordinary disposition account with respect to CFC3 would be reduced by \$20x, which is the lesser of \$25x, the amount described in § 1.245A–8(c)(1)(i) with respect to US2 for CFC2's taxable year ending November 30, 2019, and \$20x, the balance of the RGI account of US2 with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC3 (determined as of November 30, 2019, but without regard to the application of § 1.245A–8(c)(4)(i)(B) for the taxable year of CFC2 ending on that date). See § 1.245A–8(c)(1)(i) and (ii).

(E) *Application of limitation of § 1.245A–8(c)(6).* As described in paragraph (c)(4)(ii)(D) of this section, but for the application of § 1.245A–8(c)(6), there would be a total of \$30x of reductions to US1's extraordinary disposition account with respect to CFC1,

and US2's extraordinary disposition account with respect to CFC3, by reason of the application of § 1.245A–8(c)(1) with respect to CFC2's taxable year ending November 30, 2019. Because that \$30x exceeds the amount described in § 1.245A–8(c)(1)(i) with respect to US1 and US2 (\$25x)—

(1) US1's extraordinary disposition account with respect to CFC1 is reduced by \$7.86x, computed as \$10x (the reduction that would occur but for § 1.245A–8(c)(6)) less the product of \$5x (the excess amount, computed as \$30x, the total reductions that would occur but for the application of § 1.245A–8(c)(6), less \$25x, the amount described in § 1.245A–8(c)(1)(i)) and a fraction, the numerator of which is \$150x (the balance of US1's extraordinary disposition account with respect to CFC1) and the denominator of which is \$350x (\$150x, the balance of US1's extraordinary disposition account with respect to CFC1, plus \$200x, the balance of US2's extraordinary disposition account with respect to CFC3), see § 1.245A–8(c)(6); and

(2) US2's extraordinary disposition account with respect to CFC3 is reduced by \$17.14x, computed as \$20x (the reduction that would occur but for § 1.245A–8(c)(6)) less the product of \$5x (the excess amount, computed as \$30x, the total reductions that would occur but for the application of § 1.245A–8(c)(6), less \$25x, the amount described in § 1.245A–8(c)(1)(i)) and a fraction, the numerator of which is \$200x (the balance of US2's extraordinary disposition account with respect to CFC3) and the denominator of which is \$350x (\$150x, the balance of US1's extraordinary disposition account with respect to CFC1, plus \$200x, the balance of US2's extraordinary disposition account with respect to CFC3), see § 1.245A–8(c)(6) of this section.

(F) *Reduction in balance of RGI accounts.* On November 30, 2019 (the last day of CFC2's taxable year)—

(1) The balance of US1's RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC1 is decreased by \$7.86x (the amount of the reduction, pursuant to § 1.245A–8(c)(1) and by reason of the RGI account, to US1's extraordinary disposition account with respect to CFC1) and, thus, following that reduction, the balance of the RGI account is \$2.14x (\$10x – \$7.86x), see § 1.245A–8(c)(4)(i)(B); and

(2) The balance of US2's RGI account with respect to CFC2 that relates to its extraordinary disposition account with respect to CFC3 is decreased by \$17.14x (the amount of the reduction, pursuant to § 1.245A–8(c)(1) and by reason of the RGI account, to US2's extraordinary disposition account with respect to CFC3) and, thus, following that reduction, the balance of the RGI account is \$2.86x (\$20x – \$17.14x), see § 1.245A–8(c)(4)(i)(B).

(5) *Example 5. Computation of duplicate DQB—(i) Facts.* The facts are the same as in paragraph (c)(1)(i) of this section (*Example 1*) (and the results are the same as in paragraph (c)(1)(ii)(A) of this section), except that CFC1 does not make any distribution to US1, and on November 30, 2018, immediately after the Disqualified Transfer, CFC2 transfers Item 1 to newly-formed CFC3 solely in exchange for

the sole share of stock of CFC3 (the contribution, “Contribution 1,” and the share of stock of CFC3, the “CFC3 Share”) and, immediately after Contribution 1, CFC3 transfers Item 1 to newly-formed CFC4 solely in exchange for the sole share of stock of CFC4 (the contribution, “Contribution 2,” and the share of stock of CFC4, the “CFC4 Share”). Pursuant to section 358(a)(1), CFC2's basis in its share of stock of CFC3 is \$90x, and CFC3's basis in its share of stock of CFC4 is \$90x basis. As a result of Contribution 1, the condition of § 1.245A–6(b)(2) is not satisfied, because on at least one day of CFC2's taxable year ending on November 30, 2018 (which ends within US1's 2018 taxable year), CFC2 does not hold Item 1. See § 1.245A–6(b)(2)(ii)(C)(1). US1 therefore applies § 1.245A–8 (rules for complex cases) for its 2018 taxable year. See § 1.245A–6(b).

(ii) *Analysis—(A) Application of exchanged basis rule under section 951A to Contribution 1 and Contribution 2.* As a result of Contribution 1, pursuant to § 1.951A–3(h)(2)(ii)(B)(2)(ii), the disqualified basis of CFC3 Share includes the disqualified basis of Item 1 (\$90x), and therefore the disqualified basis of CFC3 Share is \$90x. Similarly, as a result of Contribution 2, pursuant to § 1.951A–3(h)(2)(ii)(B)(2)(ii), the disqualified basis of CFC4 Share also includes the disqualified basis of Item 1 (\$90x), and therefore the disqualified basis of CFC4 Share is \$90x.

(B) *Determination of duplicate DQB of CFC3 Share as a result of Contribution 1.* Because the disqualified basis of CFC3 Share includes the disqualified basis of Item 1, CFC3 Share is an item of exchanged basis property that relates to Item 1. See § 1.245A–8(d)(2)(ii). In addition, because CFC3 Share is an item of exchanged basis property that relates to Item 1 (which corresponds to US1's extraordinary disposition account with respect to CFC1), CFC3 Share is, for purposes of § 1.245A–8, treated as an item of specified property that corresponds to US1's extraordinary disposition account with respect to CFC1. See § 1.245A–8(d)(2)(i). Further, the duplicate DQB of CFC3 Share as to Item 1 is \$90x, the portion of the disqualified basis of CFC3 Share that includes Item 1's disqualified basis of \$90x. See § 1.245A–8(d)(2)(iii)(A).

(C) *Determination of duplicate DQB of CFC4 Share as a result of Contribution 2.* For reasons similar to those described in paragraph (c)(5)(ii)(B) of this section, CFC4 Share is an item of exchanged basis property that relates to Item 1, CFC4 is treated for purposes of § 1.245A–8 as an item of specified property that corresponds to US1's extraordinary disposition account with respect to CFC1, and the duplicate DQB of CFC4 Share as to Item 1 is \$90x.

(D) *Determination of duplicate DQB of CFC3 Share as a result of Contribution 2.* Because the disqualified basis of CFC3 Share and the disqualified basis of CFC4 Share each includes \$90x of the disqualified basis of Item 1 and CFC3 receives the CFC4 Share in Contribution 2, the \$90x of disqualified basis of CFC3 Share is attributable to the \$90x of disqualified basis of CFC4 Share, and CFC3 Share is an item of exchanged basis property that relates to CFC4 Share. See § 1.245A–

8(d)(2)(i) and (d)(2)(iii)(C). In addition, the duplicate DQB of CFC3 Share as to CFC4 Share is \$90x. See § 1.245A-8(d)(2)(iii)(A).

(E) *Application of duplicate basis rules in § 1.245A-8(b)(5)*. For purposes of computing the fraction described in § 1.245A-8(b)(1)(ii), if US1's extraordinary disposition account with respect to CFC1 were to give rise to an extraordinary disposition amount or a tiered extraordinary disposition amount during US1's 2018 taxable year, then the duplicate DQB of CFC3 Share and the duplicate DQB of CFC4 Share would not be taken into account, because the disqualified basis of Item 1 (an item of specified property that corresponds to US1's extraordinary disposition account and as to which each of CFC3 Share and CFC4 share relates) would be taken into account. See § 1.245A-8(b)(1)(ii) and (b)(5)(i)(A). Accordingly, in such a case, for US1's 2018 taxable year, the numerator of the fraction described in § 1.245A-8(b)(1)(ii) would reflect only the disqualified basis of Item 1 or Item 2, as applicable, and the denominator would reflect only the sum of the disqualified basis of each of Item 1 and Item 2. See § 1.245A-8(b)(1)(ii) and (b)(5)(i)(A). Furthermore, to the extent there were to be a reduction under § 1.245A-8(b)(1) to the disqualified basis of Item 1, then the duplicate DQB of CFC4 Share would be reduced (but not below zero) by the product of the reduction to the disqualified basis of Item 1 and a fraction, the numerator of which would be \$90x (the duplicate DQB of CFC4 Share), and the denominator of which would also be \$90x (the duplicate DQB of CFC4 Share). See § 1.245A-8(b)(5)(i)(B). The \$90x of duplicate DQB of CFC3 Share would be excluded from the denominator of the fraction described in the previous sentence because it is attributable to the \$90x of duplicate DQB of CFC4 Share. See § 1.245A-8(b)(5)(i)(B)(2) (last sentence). For reasons similar to those described in this paragraph (c)(4)(ii)(E) with respect to the application of § 1.245A-8(b)(5)(i)(B) to CFC4 Share, the duplicate DQB of CFC3 Share would be reduced (but not below zero) by the product of the reduction to the disqualified basis of Item 1 and a fraction, the numerator of which would be \$90x, and the denominator of which would also be \$90x.

#### § 1.245A-11 Applicability dates.

(a) *In general*. Sections 1.245A-6 through 1.245A-11 apply to taxable years of a foreign corporation beginning on or after December 1, 2020 and to taxable years of section 245A shareholders in which or with which such taxable years end.

(b) *Exception*. Notwithstanding paragraph (a) of this section, a taxpayer may choose to apply §§ 1.245A-6 through 1.245A-11 for a taxable year of a foreign corporation beginning before December 1, 2020 and to a taxable year

of a section 245A shareholder in which or with which such taxable year ends, provided that the taxpayer and all persons bearing a relationship to the taxpayer described in section 267(b) or 707(b) apply §§ 1.245A-6 through 1.245A-11, in their entirety, and § 1.6038-2(f)(18) for all such taxable years and any subsequent taxable years beginning before December 1, 2020.

■ **Par. 4.** Section 1.951A-2 is amended by:

■ 1. Redesignating paragraph (c)(5)(iv) as paragraph (c)(5)(v).

■ 2. Adding new paragraph (c)(5)(iv).

■ 3. In newly redesignated paragraph (c)(5)(v)(B)(1), removing the language “(c)(5)(iv)(A)(1)” and adding the language “(c)(5)(v)(A)(1)” in its place.

■ 4. In newly redesignated paragraph (c)(5)(v)(C)(1), removing the language “(c)(5)(iv)(B)(1)” and adding the language “(c)(5)(v)(B)(1)” in its place.

■ 5. Redesignating paragraph (c)(6)(iv) as paragraph (c)(6)(v).

■ 6. Adding new paragraph (c)(6)(iv).

■ 7. In newly redesignated paragraph (c)(6)(v)(B)(1), removing the language “(c)(6)(iv)(A)(1)” and adding the language “(c)(6)(v)(A)(1)” in its place.

The additions read as follows:

#### § 1.951A-2 Tested income and tested loss.

\* \* \* \* \*

(c) \* \* \*

(5) \* \* \*

(iv) *Reductions to disqualified basis pursuant to coordination rules*. See § 1.245A-7(b) or § 1.245A-8(b), as applicable, for reductions to disqualified basis resulting from the application of § 1.245A-5.

\* \* \* \* \*

(6) \* \* \*

(iv) *Reductions to disqualified payments pursuant to coordination rules*. See § 1.245A-5(j)(8) and § 1.245A-7(b) or § 1.245A-8(b), as applicable, for reductions to disqualified payments resulting from the application of § 1.245A-5.

\* \* \* \* \*

■ **Par. 5.** Section 1.6038-2 is amended by adding paragraphs (f)(17) and (18) and (m)(5) to read as follows:

#### § 1.6038-2 Information returns required of United States persons with respect to annual accounting periods of certain foreign corporations.

\* \* \* \* \*

(f) \* \* \*

(17) *Reporting of disqualified basis and disqualified payments*. If for the

annual accounting period of a corporation it holds an item of property having disqualified basis within the meaning of § 1.951A-3(h)(2)(ii) or § 1.951A-2(c)(5), or incurs an item of deduction or loss related to a disqualified payment (within the meaning of § 1.951A-2(c)(6)(ii)(A)), then Form 5471 (or successor form) must contain such information about the disqualified basis, or such information relating to the disqualified payment, in the form and manner and to the extent prescribed by the form, instructions to the form, publication, or other guidance published in the Internal Revenue Bulletin.

(18) *Adjustments to extraordinary disposition accounts and disqualified basis*. If for the annual accounting period a section 245A shareholder of the corporation reduces its extraordinary disposition account pursuant to § 1.245A-7(c) or § 1.245A-8(c), as applicable, or the corporation reduces the disqualified basis in an item of specified property pursuant to § 1.245A-7(b) or § 1.245A-8(b), as applicable, then Form 5471 (or a successor form) must contain such information about the reduction to the extraordinary disposition account or disqualified basis, as applicable, in the form and manner and to the extent prescribed by the form, instructions to the form, publication, or other guidance published in the Internal Revenue Bulletin.

\* \* \* \* \*

(m) \* \* \*

(5) *Special rule for paragraphs (f)(17) and (18) of this section*. Paragraphs (f)(17) and (18) of this section apply with respect to information for annual accounting periods beginning after December 1, 2020. In addition, as provided in § 1.245A-11(b), paragraph (f)(18) of this section applies with respect to information for an annual accounting period that includes a taxable year for which a taxpayer has chosen to apply §§ 1.245A-6 through 1.245A-11 pursuant to § 1.245A-11(b).

**Sunita Lough,**

*Deputy Commissioner for Services and Enforcement.*

Approved: November 13, 2020

**David J. Kautter,**

*Assistant Secretary of the Treasury (Tax Policy).*

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**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9912]

RIN 1545-BP76

**Guidance Clarifying Premium Tax Credit Unaffected by Suspension of Personal Exemption Deduction****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final regulations.

**SUMMARY:** This document includes final regulations under sections 36B and 6011 of the Internal Revenue Code (Code) that clarify that the reduction of the personal exemption deduction to zero for taxable years beginning after December 31, 2017, and before January 1, 2026, does not affect an individual taxpayer's ability to claim the premium tax credit. These final regulations affect individuals who claim the premium tax credit.

**DATES:** *Effective date:* These final regulations are effective on December 1, 2020.

*Applicability date:* These final regulations apply to taxable years ending on or after December 31, 2020.

**FOR FURTHER INFORMATION CONTACT:** Suzanne R. Sinno at (202) 317-4718 or Lisa Mojiri-Azad at (202) 317-4649 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** Background and Explanation of Provisions

*I. Overview*

This document contains final amendments to the Income Tax Regulations (26 CFR part 1) under sections 36B and 6011 of the Code.

Section 151 of the Code generally allows a taxpayer to claim a personal exemption deduction, based on the exemption amount defined in section 151(d), for the taxpayer, the taxpayer's spouse, and any dependents, as defined in section 152 of the Code. On December 22, 2017, section 151(d)(5) was added to the Code by section 11041 of Public Law 115-97, 131 Stat. 2054, 2082, commonly referred to as the Tax Cuts and Jobs Act (TCJA). Section 151(d)(5)(A) provides that, for taxable years beginning after December 31, 2017, and before January 1, 2026, "[t]he term 'exemption amount' means zero." However, section 151(d)(5)(B) provides that the reduction of the exemption amount to zero is not taken into account in determining whether a deduction under section 151 is allowed or

allowable to a taxpayer, or whether a taxpayer is entitled to a deduction under section 151, for purposes of any other provision of the Code. The conference report to the TCJA states that this provision clarifies that the reduction of the personal exemption to zero "should not alter the operation of those provisions of the Code which refer to a taxpayer allowed a deduction . . . under section 151." See H.R. Rep. No. 115-466 at 203 n.16 (Conf. Rep.) (2017).

Beginning in 2014, under the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, PPACA), eligible individuals who purchase coverage under a qualified health plan through a Health Insurance Exchange (Exchange) established under section 1311 of the PPACA may claim a premium tax credit under section 36B of the Code. Several rules relating to the premium tax credit apply based on whether a taxpayer properly claims or claimed a personal exemption deduction under section 151 for the taxpayer, the taxpayer's spouse, and any dependents. These rules affect eligibility for the premium tax credit, computation of the premium tax credit, reconciliation of advance credit payments with the premium tax credit a taxpayer is allowed for the taxable year, and income tax return filing requirements related to the premium tax credit.

*II. Eligibility for, and Computation of, the Premium Tax Credit*

To be eligible for the premium tax credit, an individual must be an applicable taxpayer. Under section 36B(c)(1), an applicable taxpayer generally is a taxpayer whose household income for the taxable year is at least 100 percent but not more than 400 percent of the Federal poverty line for the taxpayer's family size for the taxable year. A taxpayer's family size is equal to the number of individuals in the taxpayer's family. Section 1.36B-1(d) of the Income Tax Regulations provides the rules for determining the individuals in a taxpayer's family. Section 1.36B-1(d), as currently in effect, provides that a taxpayer's family means the individuals for whom a taxpayer properly claims a deduction for a personal exemption under section 151 for the taxable year, and further provides that family size means the number of individuals in the family. Additionally, § 1.36B-2(b)(3) provides that an individual is not an applicable taxpayer if another taxpayer may claim a deduction under section 151 for the

individual for a taxable year beginning in the calendar year in which the individual's taxable year begins.

Section 36B(c)(2) provides that the premium tax credit generally is not allowed for a month with respect to an individual if for that month the individual is eligible for minimum essential coverage other than coverage in the individual market. However, under a special eligibility rule in § 1.36B-2(c)(4)(i), an individual who may enroll in minimum essential coverage because of a relationship to another person eligible for the coverage but for whom the other eligible person does not claim a personal exemption deduction under section 151 is treated as eligible for minimum essential coverage under such coverage only for months that the related individual is enrolled in the coverage.

Under section 36B(a), a taxpayer's premium tax credit is equal to the premium assistance credit amount for the taxable year. Section 36B(b)(1) and § 1.36B-3(d) generally provide that the premium assistance credit amount is the sum of the premium assistance amounts for all coverage months in the taxable year for individuals in the taxpayer's family, as defined in § 1.36B-1(d).

*III. Reconciliation of Advance Credit Payments With the Premium Tax Credit*

Under section 1412 of the PPACA, advance payments of the premium tax credit (advance credit payments) may be paid directly to issuers of qualified health plans on behalf of eligible individuals. The amount of advance credit payments made on behalf of a taxpayer in a taxable year is determined by a number of factors, including projections of the taxpayer's household income and family size for the taxable year. Under § 1.36B-4, a taxpayer generally must reconcile all advance credit payments for coverage of any member of the taxpayer's family with the amount of the premium tax credit allowed under section 36B.

Section 1.36B-4(a)(1)(ii) provides allocation rules to reconcile advance credit payments when a taxpayer's family members are enrolled with one or more individuals who are not members of the taxpayer's family. If a taxpayer enrolls an individual and another taxpayer claims a personal exemption deduction for the individual, the allocation rules in § 1.36B(a)(1)(ii)(B) apply for purposes of computing each taxpayer's premium tax credit and reconciling any advance credit payments. If advance credit payments are made for coverage of an individual for whom no taxpayer claims a personal exemption deduction,

§ 1.36B–4(a)(1)(ii)(C) provides that the taxpayer who attested to the Exchange to the intention to claim a personal exemption deduction for the individual as part of the advance credit payment eligibility determination for coverage of the individual must reconcile the advance credit payments.

#### *IV. Income Tax Return Filing Requirements Related to the Premium Tax Credit*

Section 6011 provides the general rules for filing a return. Section 1.6011–8 requires a taxpayer who receives the benefit of advance credit payments in a taxable year to file an income tax return for that taxable year to reconcile advance credit payments with the taxpayer's premium tax credit. The regulation further provides that if advance credit payments are made for coverage of an individual for whom no taxpayer claims a personal exemption deduction, the taxpayer who attested to the Exchange to the intention to claim a personal exemption deduction for the individual as part of the advance credit payment eligibility determination for coverage of the individual must file a tax return and reconcile the advance credit payments. Taxpayers who are required to reconcile advance credit payments or who claim the premium tax credit must complete Form 8962, *Premium Tax Credit (PTC)*, and file it with their income tax return.

#### *V. Notice 2018–84*

On November 5, 2018, the Department of the Treasury (Treasury Department) and the IRS issued Notice 2018–84, 2018–45 I.R.B. 768, which provided interim guidance clarifying that the reduction of the personal exemption deduction to zero under section 151(d)(5) does not affect the ability of individual taxpayers to claim the premium tax credit. Specifically, the notice provides that (1) a taxpayer is considered to have claimed a personal exemption deduction for himself or herself for a taxable year if the taxpayer files an income tax return for the year and does not qualify as a dependent of another taxpayer under section 152 for the year; and (2) a taxpayer is considered to have claimed a personal exemption deduction for an individual other than the taxpayer if the taxpayer is allowed a personal exemption deduction for the individual, taking into account section 151(d)(5)(B), and lists the individual's name and taxpayer identification number (TIN) on the Form 1040, *U.S. Individual Income Tax Return*, or Form 1040NR, *U.S. Nonresident Alien Income Tax Return*, the taxpayer files for the year. The

notice states that until further guidance is issued, the interim guidance described in the notice applies. The notice also states that the Treasury Department and the IRS intend to amend the regulations under sections 36B and 6011 to clarify the application of section 151(d)(5).

#### *VI. Proposed Regulations*

On May 27, 2020, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–124810–19) in the **Federal Register** (85 FR 31710) under section 36B. The notice of proposed rulemaking announced that the regulations currently in effect would be amended to reflect the guidance in Notice 2018–84. Specifically, § 1.36B–1(d), as proposed, would define the term family to mean the taxpayer, including both spouses in the case of a joint return, except for individuals who qualify as a dependent of another taxpayer under section 152, and any other individual for whom the taxpayer is allowed a personal exemption deduction and whom the taxpayer properly reports on the taxpayer's income tax return for the taxable year. Consistent with Notice 2018–84, the proposed regulations would provide that an individual is reported on the taxpayer's income tax return if the individual's name and taxpayer identification number (TIN) are listed on the taxpayer's Form 1040 series return. To conform to § 1.36–1(d) as proposed, §§ 1.36B–2, 1.36B–4, and 1.6011–8 would be amended. These amendments as proposed would apply for taxable years ending after the date of publication of the final regulations in the **Federal Register**.

#### *VII. Final Regulations*

No comments responsive to the subject of the notice of proposed rulemaking were received. There were no requests for a public hearing on the proposed regulations, so no public hearing was held. Accordingly, the Treasury Department and the IRS are finalizing the proposed regulations with no changes. The final regulations are applicable for taxable years ending on or after December 31, 2020. However, taxpayers may apply the final regulations for taxable years to which section 151(d)(5) applies ending before December 31, 2020. See section 7805(b)(7).

#### **Special Analyses**

These final regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department

and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the final regulations affect individual taxpayers, not entities. Accordingly, the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f), these final regulations have been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business (85 FR 31710). No comments on the notice were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

#### *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

#### *Executive Order 13132: Federalism*

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### **Statement of Availability of IRS Documents**

The regulations, notices and other guidance cited in this preamble are generally published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office,

Washington, DC 20402, or by visiting the IRS website at [www.irs.gov](http://www.irs.gov).

### Drafting Information

The principal author of these final regulations is Suzanne R. Sinno of the Office of Associate Chief Counsel (Income Tax and Accounting). Other personnel from the Treasury Department and the IRS participated in the development of the regulations.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

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

■ **Par. 2.** Section 1.36B–0 is amended by:

- 1. Revising the entries for § 1.36B–1(d) and (o).
  - 2. Revising the entries for § 1.36B–2(c)(4)(i) and (e).
  - 3. Revising the entries for § 1.36B–4(a)(1)(ii)(B) and (C).
  - 4. Revising the entry for § 1.36B–4(c).
- The revisions read as follows:

#### § 1.36B–1 Premium tax credit definitions.

\* \* \* \* \*

(d) Family and family size.

(1) In general.

(2) Special rule for tax years to which section 151(d)(5) applies.

\* \* \* \* \*

(o) Applicability dates.

#### § 1.36B–2 Eligibility for premium tax credit.

\* \* \* \* \*

(c) \* \* \*

(4) \* \* \*

(i) Related individual.

\* \* \* \* \*

(e) Applicability dates.

#### § 1.36B–4 Reconciling the premium tax credit with advance credit payments.

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(B) Individuals enrolled by a taxpayer and claimed by another taxpayer.

(C) Responsibility for advance credit payments for an individual not reported on any taxpayer's return.

\* \* \* \* \*

(c) Applicability dates.

\* \* \* \* \*

■ **Par. 3.** Section 1.36B–1 is amended by

- 1. Redesignating paragraph (d) as paragraph (d)(1).

■ 2. Revising the paragraph heading to newly designated paragraph (d)(1).

■ 3. Adding paragraph (d)(2).

■ 4. Revising paragraph (o).

The additions and revisions read as follows:

#### § 1.36B–1 Premium tax credit definitions.

\* \* \* \* \*

(d) Family and family size—(1) *In general.* \* \* \*

(2) *Special rule for tax years to which section 151(d)(5) applies.* For taxable years to which section 151(d)(5) applies, a taxpayer's family means the taxpayer, including both spouses in the case of a joint return, except for individuals who qualify as a dependent of another taxpayer under section 152, and any other individual for whom the taxpayer is allowed a personal exemption deduction and whom the taxpayer properly reports on the taxpayer's income tax return for the taxable year. For purposes of this paragraph (d)(2), an individual is reported on the taxpayer's income tax return if the individual's name and taxpayer identification number (TIN) are listed on the taxpayer's Form 1040 series return. *See* § 601.602 of this chapter.

\* \* \* \* \*

(o) *Applicability dates.* (1) Except for paragraphs (d)(2), (l), and (m) of this section, this section applies to taxable years ending after December 31, 2013.

(2) Paragraph (d)(2) of this section applies to taxable years ending on or after December 31, 2020.

(3) Paragraphs (l) and (m) of this section apply to taxable years beginning after December 31, 2018. Paragraphs (l) and (m) of § 1.36B–1 as contained in 26 CFR part 1 edition revised as of April 1, 2016, apply to taxable years ending after December 31, 2013, and beginning before January 1, 2019.

■ **Par. 4.** Section 1.36B–2 is amended by:

- 1. Revising paragraph (c)(4)(i).
- 2. Revising the heading for paragraph (e).
- 3. Adding paragraph (e)(4).

The revisions and addition read as follows:

#### § 1.36B–2 Eligibility for premium tax credit.

\* \* \* \* \*

(c) \* \* \*

(4) *Special eligibility rules—(i) Related individual.* An individual who may enroll in minimum essential coverage because of a relationship to another person eligible for the coverage, but is not included in the family, as defined in § 1.36B–1(d), of the other eligible person, is treated as eligible for such minimum essential coverage only

for months that the related individual is enrolled in the coverage.

\* \* \* \* \*

(e) *Applicability dates.* \* \* \*

(4) Paragraph (c)(4)(i) of this section applies to taxable years ending on or after December 31, 2020.

■ **Par. 5.** Section 1.36B–4 is amended by:

- 1. Adding a sentence to the end of paragraph (a)(1)(ii)(B)(1).
- 2. Revising paragraphs (a)(1)(ii)(B)(2) and (a)(1)(ii)(C).
- 3. Revising the paragraph heading to paragraph (c) and adding a sentence at the end.

The additions and revisions read as follows:

#### § 1.36B–4 Reconciling the premium tax credit with advance credit payments.

(a) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(B) *Individual enrolled by a taxpayer and claimed by another taxpayer—(1) In general.* \* \* \* For taxable years to which section 151(d)(5) applies, the claiming taxpayer is the taxpayer who properly includes the shifting enrollee in his or her family for the taxable year.

(2) *Allocation percentage.* The enrolling taxpayer and claiming taxpayer may agree on any allocation percentage between zero and one hundred percent. If the enrolling taxpayer and claiming taxpayer do not agree on an allocation percentage, the percentage is equal to the number of shifting enrollees properly included in the enrolling taxpayer's family divided by the number of individuals enrolled by the enrolling taxpayer in the same qualified health plan as the shifting enrollee.

\* \* \* \* \*

(C) *Responsibility for advance credit payments for an individual not reported on any taxpayer's return.* If advance credit payments are made for coverage of an individual who is not included in any taxpayer's family, as defined in § 1.36B–1(d), the taxpayer who attested to the Exchange to the intention to include such individual in the taxpayer's family as part of the advance credit payment eligibility determination for coverage of the individual must reconcile the advance credit payments.

\* \* \* \* \*

(c) *Applicability dates.* \* \* \* The last sentence of paragraph (a)(1)(ii)(B)(1), paragraph (a)(1)(ii)(B)(2), and paragraph (a)(1)(ii)(C) of this section apply to taxable years ending on or after December 31, 2020.

■ **Par. 6.** Section 1.6011–8 is amended by revising paragraphs (a) and (b) as follows:

**§ 1.6011–8 Requirement of income tax return for taxpayers who claim the premium tax credit under section 36B.**

(a) *Requirement of return.* Except as otherwise provided in this paragraph (a), a taxpayer who receives the benefit of advance payments of the premium tax credit (advance credit payments) under section 36B must file an income tax return for that taxable year on or before the due date for the return (including extensions of time for filing) and reconcile the advance credit payments. However, if advance credit payments are made for coverage of an individual who is not included in any taxpayer's family, as defined in § 1.36B–1(d), the taxpayer who attested to the Exchange to the intention to include such individual in the taxpayer's family as part of the advance credit payment eligibility determination for coverage of the individual must file a tax return and reconcile the advance credit payments.

(b) *Applicability dates*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, paragraph (a) of this section applies for taxable years ending on or after December 31, 2020.

(2) *Prior periods.* Paragraph (a) of this section as contained in 26 CFR part 1 edition revised as of April 1, 2016, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2017. Paragraph (a) of this section as contained in 26 CFR part 1 edition revised as of April 1, 2020, applies to taxable years beginning after December 31, 2016, and ending before December 31, 2020.

**Sunita Lough,**

*Deputy Commissioner for Services and Enforcement.*

Approved: September 4, 2020.

**David J. Kautter,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2020–26200 Filed 11–27–20; 11:15 am]

**BILLING CODE 4830–01–P**

**DEPARTMENT OF JUSTICE****Office of the Attorney General****28 CFR Part 26**

[Docket Number OAG 171; AG Order No. 4911–2020 ]

**RIN 1105–AB63**

**Manner of Federal Executions***Correction*

In rule document 2020–25867 beginning on page 75846 in the issue of Friday, November 27, 2020, make the following correction:

On page 75846, in the third column, in the last line, “December 24, 2020” should read “December 28, 2020.”

[FR Doc. C1–2020–25867 Filed 11–30–20; 8:45 am]

**BILLING CODE 1301–00–D**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Medicare & Medicaid Services****45 CFR Part 153**

[CMS–9913–F]

**RIN 0938–AU23**

**Amendments to the HHS-Operated Risk Adjustment Data Validation (HHS–RADV) Under the Patient Protection and Affordable Care Act’s HHS-Operated Risk Adjustment Program**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts certain changes to the risk adjustment data validation error estimation methodology beginning with the 2019 benefit year for states where the Department of Health and Human Services (HHS) operates the risk adjustment program. This rule is finalizing changes to the HHS–RADV error estimation methodology, which is used to calculate adjusted risk scores and risk adjustment transfers, beginning with the 2019 benefit year of HHS–RADV. This rule also finalizes a change to the benefit year to which HHS–RADV adjustments to risk scores and risk adjustment transfers would be applied beginning with the 2020 benefit year of HHS–RADV. These policies seek to further the integrity of HHS–RADV, address stakeholder feedback, promote fairness, and improve the predictability of HHS–RADV adjustments.

**DATES:** These regulations are effective on December 31, 2020.

**FOR FURTHER INFORMATION CONTACT:**

Allison Yadsco, (410) 786–1740; Joshua Paul, (301) 492–4347; Adrienne Patterson, (410) 786–0686; and Jaya Ghildiyal, (301) 492–5149.

**SUPPLEMENTARY INFORMATION:****I. Background***A. Legislative and Regulatory Overview*

The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) was enacted on March 30, 2010. These statutes are collectively

referred to as “PPACA” in this final rule. Section 1343 of the PPACA<sup>1</sup> established a permanent risk adjustment program to provide payments to health insurance issuers that attract higher-than-average risk populations, such as those with chronic conditions, funded by payments from those that attract lower-than-average risk populations, thereby reducing incentives for issuers to avoid higher-risk enrollees. The PPACA directs the Secretary of the Department of Health and Human Services (Secretary), in consultation with the states, to establish criteria and methods to be used in carrying out risk adjustment activities, such as determining the actuarial risk of enrollees in risk adjustment covered plans within a state market risk pool.<sup>2</sup> The statute also provides that the Secretary may utilize criteria and methods similar to the ones utilized under Medicare Parts C or D.<sup>3</sup> Consistent with section 1321(c)(1) of the PPACA, the Secretary is responsible for operating the risk adjustment program on behalf of any state that elected not to do so. For the 2014 through 2016 benefit years, all states and the District of Columbia, except Massachusetts, participated in the HHS-operated risk adjustment program. Since the 2017 benefit year, all states and the District of Columbia have participated in the HHS-operated risk adjustment program.

Data submission requirements for the HHS-operated risk adjustment program are set forth at 45 CFR 153.700 through 153.740. Each issuer is required to establish and maintain an External Data Gathering Environment (EDGE) server on which the issuer submits masked enrollee demographics, claims, and encounter diagnosis-level data in a format specified by the Department of Health and Human Services (HHS). Issuers must also execute software provided by HHS on their respective EDGE servers to generate summary reports, which HHS uses to calculate the enrollee-level risk scores to determine the average plan liability risk scores for each state market risk pool, the individual issuers' plan liability risk scores, and the transfer amounts by state market risk pool for the applicable benefit year.<sup>4</sup>

Pursuant to 45 CFR 153.350, HHS performs HHS–RADV to validate the accuracy of data submitted by issuers

<sup>1</sup> 42 U.S.C. 18063.

<sup>2</sup> 42 U.S.C. 18063(a) and (b).

<sup>3</sup> 42 U.S.C. 18063(b).

<sup>4</sup> HHS also uses the data issuers submit to their EDGE servers for the calculation of the high-cost risk pool payments and charges added to the HHS risk adjustment methodology beginning with the 2018 benefit year.

for the purposes of risk adjustment transfer calculations for states where HHS operates the risk adjustment program. The purpose of HHS–RADV is to ensure issuers are providing accurate and complete risk adjustment data to HHS, which is crucial to the purpose and proper functioning of the HHS-operated risk adjustment program. This process establishes uniform audit standards to ensure that actuarial risk is accurately and consistently measured, thereby strengthening the integrity of the HHS-operated risk adjustment program.<sup>5</sup> HHS–RADV also ensures that issuers’ actual actuarial risk is reflected in risk adjustment transfers and that the HHS-operated program assesses charges to issuers with plans with lower-than-average actuarial risk while making payments to issuers with plans with higher-than-average actuarial risk. Pursuant to 45 CFR 153.350(a), HHS, in states where it operates the program, must ensure proper validation of a statistically valid sample of risk adjustment data from each issuer that offers at least one risk adjustment covered plan<sup>6</sup> in that state. Under 45 CFR 153.350, HHS, in states where it operates the program, may adjust the plan average actuarial risk for a risk adjustment covered plan based on errors discovered as a result of HHS–RADV and use those adjusted risk scores to modify charges and payments to all risk adjustment covered plan issuers in the same state market risk pool.

For the HHS-operated risk adjustment program, 45 CFR 153.630 requires an issuer of a risk adjustment covered plan to have an initial and second validation audit performed on its risk adjustment data for the applicable benefit year. Each issuer must engage one or more independent auditors to perform the initial validation audit (IVA) of a sample of risk adjustment data selected by HHS.<sup>7</sup> The issuer provides demographic, enrollment, and claims data and medical record documentation for a sample of enrollees selected by HHS to its IVA entity for data validation. After the IVA entity has validated the HHS-selected sample, a subsample is validated in a second validation audit (SVA).<sup>8</sup> The SVA is conducted by an entity HHS retains to verify the accuracy of the findings of the IVA.

HHS conducted two pilot years of HHS–RADV for the 2015 and 2016

benefit years<sup>9</sup> to give HHS and issuers experience with HHS–RADV prior to applying HHS–RADV findings to adjust issuers’ risk scores, as well as the risk adjustment transfers in the applicable state market risk pools. The 2017 benefit year HHS–RADV was the first payment year that resulted in adjustments to issuers’ risk scores and the risk adjustment transfers in the applicable state market risk pools as a result of HHS–RADV findings.<sup>10 11</sup>

When initially developing the HHS–RADV process, HHS sought the input of issuers, consumer advocates, providers, and other stakeholders, and issued the “Affordable Care Act HHS-Operated Risk Adjustment Data Validation Process White Paper” on June 22, 2013 (the 2013 RADV White Paper).<sup>12</sup> The 2013 RADV White Paper discussed and sought comment on a number of potential considerations for the development and operation of HHS–RADV. Based on the feedback received, HHS promulgated regulations to implement HHS–RADV that we have modified in certain respects based on experience and public input, as follows.

In the July 15, 2011 **Federal Register** (76 FR 41929), we published a proposed rule outlining the framework for the risk adjustment program, including standards related to HHS–RADV. We implemented the risk adjustment program and adopted standards related to HHS–RADV in a final rule, published in the March 23, 2012 **Federal Register** (77 FR 17219) (Premium Stabilization Rule). The HHS–RADV regulations adopted in the Premium Stabilization Rule provide for adjustments to risk scores and risk adjustment transfers to reflect HHS–RADV errors, including the two-sided nature of such adjustments.

In the December 7, 2012 **Federal Register** (77 FR 73117), we published a proposed rule outlining benefit and

payment parameters related to the risk adjustment program, including six steps for error estimation for HHS–RADV in 45 CFR 153.630 (proposed 2014 Payment Notice). We published the 2014 Payment Notice final rule in the March 11, 2013 **Federal Register** (78 FR 15436). In addition to finalizing 45 CFR 153.630, this final rule further clarified HHS–RADV policies, including that adjustments would occur when an issuer under-reported its risk scores.

In the December 2, 2013 **Federal Register** (78 FR 72321), we published a proposed rule outlining the benefit and payment parameters related to the risk adjustment program (proposed 2015 Payment Notice). This rule also included several HHS–RADV proposals. In the March 11, 2014 **Federal Register** (79 FR 13743), we published the 2015 Payment Notice final rule, which finalized HHS–RADV requirements related to sampling; IVA standards, SVA processes, and medical record review as the basis of enrollee risk score validation; the error estimation process and original methodology; and HHS–RADV appeals, oversight, and data security standards. Under the original methodology adopted in that final rule, almost every failure to validate an Hierarchical Condition Category (HCC) during HHS–RADV would have resulted in an adjustment to the issuer’s risk score and an accompanying adjustment to all transfers in the applicable state market risk pool.

In the September 6, 2016 **Federal Register** (81 FR 61455), we published a proposed rule outlining benefit and payment parameters related to the risk adjustment program (proposed 2018 Payment Notice) that included proposals related to HHS–RADV. We published the 2018 Payment Notice final rule in the December 22, 2016 **Federal Register** (81 FR 94058), which included finalizing proposals related to HHS–RADV discrepancy reporting, clarifications related to certain aspects of the HHS–RADV appeals process, and a materiality threshold for HHS–RADV to ease the burden of the annual audit requirements for smaller issuers. Under the materiality threshold, issuers with total annual premiums at or below \$15 million are not subject to annual IVA requirements, but would be subject to such audits approximately every 3 years (barring risk-based triggers that would warrant more frequent audits).

In the November 2, 2017 **Federal Register** (82 FR 51042), we published a proposed rule outlining benefit and payment parameters related to the risk adjustment program (proposed 2019 Payment Notice) that included proposed provisions related to HHS–RADV. We

<sup>5</sup> HHS also has general authority to audit issuers of risk adjustment covered plans pursuant to 45 CFR 153.620(c).

<sup>6</sup> See 45 CFR 153.20 for the definition of “risk adjustment covered plan.”

<sup>7</sup> 45 CFR 153.630(b).

<sup>8</sup> 45 CFR 153.630(c).

<sup>9</sup> HHS–RADV was not conducted for the 2014 benefit year. See FAQ ID 11290a (March 7, 2016), available at: <https://www.regap.info/faq-viewu.php?id=11290>.

<sup>10</sup> The Summary Report of 2017 Benefit Year HHS–RADV Adjustments to Risk Adjustment Transfers released on August 1, 2019 is available at: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/BY2017-HHSRADV-Adjustments-to-RA-Transfers-Summary-Report.pdf>.

<sup>11</sup> The one exception is for Massachusetts issuers, who were not able to participate in prior HHS–RADV pilot years because the state operated risk adjustment for the 2014–2016 benefit years. Therefore, HHS made the 2017 benefit year HHS–RADV a pilot year for Massachusetts issuers. See 84 FR 17454 at 17508.

<sup>12</sup> A copy of the Affordable Care Act HHS-Operated Risk Adjustment Data Validation Process White Paper (June 22, 2013) is available at: [https://www.regap.info/uploads/library/ACA\\_HHS\\_OperatedRADVWhitePaper\\_062213\\_5CR\\_050718.pdf](https://www.regap.info/uploads/library/ACA_HHS_OperatedRADVWhitePaper_062213_5CR_050718.pdf).



published the 2019 Payment Notice final rule in the April 17, 2018 **Federal Register** (83 FR 16930), which included finalizing for 2017 benefit year HHS–RADV and beyond, an amended error estimation methodology to only adjust issuers' risk scores when an issuer's failure rate is materially different from other issuers based on three HCC groupings (low, medium, and high), that is, when an issuer is identified as an outlier. We also finalized an exemption for issuers with 500 or fewer billable member months from HHS–RADV; a requirement that IVA samples only include enrollees from state market risk pools with more than one issuer; clarifications regarding civil money penalties for non-compliance with HHS–RADV; and a process to handle demographic or enrollment errors discovered during HHS–RADV. We finalized an exception to the prospective application of HHS–RADV results for exiting issuers,<sup>13</sup> such that exiting outlier issuers' results are used to adjust the benefit year being audited (rather than the following transfer year).

In the July 30, 2018 **Federal Register** (83 FR 36456), we published a final rule that adopted the 2017 benefit year HHS-operated risk adjustment methodology set forth in the final rules published in the March 23, 2012 and March 8, 2016 editions of the **Federal Register** (77 FR 17220 through 17252 and 81 FR 12204 through 12352, respectively). This final rule set forth additional explanation of the rationale supporting the use of statewide average premium in the HHS-operated risk adjustment state payment transfer formula for the 2017 benefit year, including why the program is operated in a budget-neutral manner. This final rule permitted HHS to resume 2017 benefit year program operations, including collection of risk adjustment charges and distribution of risk adjustment payments. HHS also provided guidance as to the operation of the HHS-operated risk adjustment program for the 2017 benefit year in light of publication of this final rule.<sup>14</sup>

<sup>13</sup> To be an exiting issuer, the issuer has to exit all of the market risk pools in the state (that is, not sell or offer any new plans in the state). If an issuer only exits some market risk pools in the state, but continues to sell or offer plans in others, it is not an exiting issuer. A small group issuer with off-calendar year coverage, who exits the small group market risk pool in a state and only has small group carry-over coverage that ends in the next benefit year, and is not otherwise selling or offering new plans in any market risk pools in the state, would be an exiting issuer. See 83 FR 16965 through 16966 and 84 FR 17503 through 17504.

<sup>14</sup> "Update on the HHS-operated Risk Adjustment Program for the 2017 Benefit Year." July 27, 2018. Available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2017-RA-Final-Rule-Resumption-RAOps.pdf>.

In the August 10, 2018 **Federal Register** (83 FR 39644), we published a proposed rule concerning the adoption of the 2018 benefit year HHS-operated risk adjustment methodology set forth in the final rules published in the March 23, 2012 and December 22, 2016 editions of the **Federal Register** (77 FR 17220 through 17252 and 81 FR 94058 through 94183, respectively). The proposed rule set forth additional explanation of the rationale supporting use of statewide average premium in the HHS-operated risk adjustment state payment transfer formula for the 2018 benefit year, including why the program is operated in a budget-neutral manner. In the December 10, 2018 **Federal Register** (83 FR 63419), we issued a final rule adopting the 2018 benefit year HHS-operated risk adjustment methodology as established in the final rules published in the March 23, 2012 and the December 22, 2016 (77 FR 17220 through 1752 and 81 FR 94058 through 94183, respectively) editions of the **Federal Register**. This final rule permitted HHS to resume 2018 benefit year program operations, including collection of risk adjustment charges and distribution of risk adjustment payments.

In the January 24, 2019 **Federal Register** (84 FR 227), we published a proposed rule outlining the benefit and payment parameters related to the risk adjustment program, including updates to HHS–RADV requirements (proposed 2020 Payment Notice). We published the 2020 Payment Notice final rule in the April 25, 2019 **Federal Register** (84 FR 17454) (2020 Payment Notice). The final rule included policies related to incorporating risk adjustment prescription drug categories (RXC) into HHS–RADV beginning with the 2018 benefit year and extending the Neyman allocation to the 10th stratum for HHS–RADV sampling. We also finalized using precision analysis to determine whether the SVA results of the full sample or the subsample (of up to 100 enrollees) results should be used in place of IVA results when an issuer's IVA results have insufficient agreement with SVA results following a pairwise means test. We clarified the application and distribution of default data validation charges under 45 CFR 153.630(b)(10) and how HHS will apply error rates for exiting issuers and sole issuer markets. We codified the previously established materiality threshold and exemption for issuers

<sup>15</sup> An RXC uses a drug to impute a diagnosis (or indicate the severity of diagnosis) otherwise indicated through medical coding in a hybrid diagnoses-and-drugs risk adjustment model.

with 500 or fewer billable member months and established a new exemption from HHS–RADV for issuers in liquidation who met certain conditions. In response to comments, in the final rule, we updated the timeline for collection, distribution, and reporting of HHS–RADV adjustments to transfers; provided that the 2017 benefit year would be a pilot year for HHS–RADV for Massachusetts; and established that the 2018 benefit year would be a pilot year for incorporating RXCs into HHS–RADV.

In the February 6, 2020 **Federal Register** (85 FR 7088), we published a proposed rule outlining the benefit and payment parameters related to the risk adjustment program (proposed 2021 Payment Notice), including several HHS–RADV proposals. Among other things, in this rule, we proposed updates to the diagnostic classifications and risk factors in the HHS risk adjustment models beginning with the 2021 benefit year to reflect more recent claims data, as well as proposed amendments to the outlier identification process for HHS–RADV in cases where an issuer's HCC count is low. We proposed that beginning with 2019 benefit year HHS–RADV, any issuer with fewer than 30 EDGE HCCs (hierarchical condition categories) within an HCC failure rate group would not be determined to be an outlier. We also proposed to make 2019 benefit year HHS–RADV another pilot year for the incorporation of RXCs to allow additional time for HHS, issuers, and auditors to gain experience with validating RXCs. On May 14, 2020, we published the HHS Notice of Benefit and Payment Parameters for 2021 final rule (85 FR 29164) (2021 Payment Notice) that finalized these HHS–RADV changes as proposed. The proposed updates to the diagnostic classifications and risk factors in the HHS risk adjustment models were also finalized with some modifications.

As explained in prior notice-and-comment rulemaking,<sup>16</sup> while the PPACA did not include an explicit requirement that the risk adjustment program operate in a budget-neutral manner, HHS is constrained by appropriations law to devise and implement its risk adjustment program in a budget-neutral fashion.<sup>17</sup> Although the statutory provisions for many other PPACA programs appropriated funding, authorized amounts to be appropriated, or provided budget authority in advance

<sup>16</sup> See, e.g., 78 FR 15441 and 83 FR 16930.

<sup>17</sup> Also see *New Mexico Health Connections v. United States Department of Health and Human Services*, 946 F.3d 1138 (10th Cir. 2019).



of appropriations,<sup>18</sup> the PPACA neither authorized nor appropriated additional funding for risk adjustment payments beyond the amount of charges paid in, and did not authorize HHS to obligate itself for risk adjustment payments in excess of charges collected.<sup>19</sup> Indeed, unlike the Medicare Prescription Drug, Improvement and Modernization Act of 2003, which expressly authorized the appropriation of funds and provided budget authority in advance of appropriations to make Part D risk-adjusted payments, the PPACA's risk adjustment statute made no reference to additional appropriations.<sup>20</sup> Congress did not give HHS discretion to implement a risk adjustment program that was not budget neutral. Because Congress omitted from the PPACA any provision appropriating independent funding or creating budget authority in advance of an appropriation for the risk adjustment program, we explained that HHS could not—absent another source of appropriations—have designed the program in a way that required payments in excess of collections consistent with binding appropriations law.

#### B. Stakeholder Consultation and Input

HHS has consulted with stakeholders on policies related to the HHS-operated risk adjustment program and HHS–RADV. We held a series of stakeholder listening sessions to gather input, and received input from numerous interested groups, including states, health insurance issuers, and trade groups. Prior to the proposed rule, we also issued a white paper for public comment on December 6, 2019 entitled the HHS Risk Adjustment Data Validation (HHS–RADV) White Paper (2019 RADV White Paper).<sup>21</sup> We considered comments received on the

2019 RADV White Paper and in connection with previous rules as we developed the policies in the proposed rule. For this final rule, we considered all public input we received on the topics addressed in the proposed rule as we developed the finalized policies.

#### II. Provisions of the Final Regulations and Analyses and Responses to Public Comments

In the June 2, 2020 **Federal Register** (85 FR 33595), we published the “Amendments to the HHS-Operated Risk Adjustment Data Validation Under the Patient Protection and Affordable Care Act’s HHS-Operated Risk Adjustment Program” proposed rule. The proposed rule proposed several refinements to the HHS–RADV error rate calculation, and proposed to transition away from the current prospective application of HHS–RADV results.<sup>22</sup> The proposals were designed to specifically address stakeholder feedback received after the first payment year of HHS–RADV. In addition to soliciting comments on the specific policy proposals in the proposed rule, we requested feedback on the potential impact of the COVID–19 public health emergency on the proposed effective dates for implementation of the proposals. We received 25 comments from health insurance issuers, industry trade associations, and other stakeholders. These comments ranged from general support of or opposition to the proposed changes to specific questions or comments regarding proposed changes. We also received a number of comments and suggestions that were outside the scope of the proposed rule that are not addressed in this final rule. In this final rule, we provide a summary of the proposed changes, a summary of the public comments received that directly relate to these proposals, our responses to these comments, and a description of the provisions we are finalizing.

This rule finalizes the proposed changes to two aspects of HHS–RADV: (A) The error rate calculation, and (B) the application of HHS–RADV results, with the modifications described below. Beginning with the 2019 benefit year of HHS–RADV,<sup>23</sup> we are finalizing as

proposed the following refinements to the error rate calculation: (1) An adjustment to the HCC grouping methodology to address the influence of the HCC hierarchies and coefficient estimation groups; (2) a sliding scale adjustment for calculating an issuer’s adjustment factor that changes the confidence intervals for determining outliers and applies a sliding scale adjustment in cases where an outlier issuer is close to the edges of the confidence interval for one or more HCC failure rate groups; and (3) a modification to the error rate calculation in cases where a negative error rate outlier issuer also has a negative failure rate. We are also finalizing the transition from the current prospective application of HHS–RADV results<sup>24</sup> to an approach that would apply HHS–RADV results to the benefit year being audited. After consideration of comments, we will switch to the concurrent application of HHS–RADV results beginning with the 2020 benefit year.<sup>25</sup> We believe these policies address stakeholder feedback received and our experience with the first payment year of HHS–RADV on these issues. These finalized policies seek to further the integrity of HHS–RADV while maintaining stability, promoting fairness and improving the predictability of HHS–RADV. The following is a summary of the comments received on the proposed rule’s timeline for implementing these policies:<sup>26</sup>

*Comments:* One commenter was concerned that the COVID–19 public health emergency would impact the completeness of 2019 (and possibly 2020) data while another commenter

*Postponement-Memo.pdf.* Also, we have provided further guidance on the updated schedule for the 2019 benefit year HHS–RADV, which is outlined in the 2019 Benefit Year Timeline of Activities: [https://www.regtap.info/uploads/library/HRADV\\_Timeline\\_091020\\_5CR\\_091020.pdf](https://www.regtap.info/uploads/library/HRADV_Timeline_091020_5CR_091020.pdf).

<sup>24</sup> The exception to the current prospective application of HHS–RADV results is for exiting issuers identified as positive error rate outliers, whose HHS–RADV results are applied to the risk scores and transfer amounts for the benefit year being audited.

<sup>25</sup> As detailed in section II.B, to effectuate the transition beginning with the 2020 benefit year, we will aggregate results from the 2019 and 2020 benefit years of HHS–RADV for non-exiting issuers using the average error rate approach and apply the aggregated results to 2020 risk scores and transfers.

<sup>26</sup> We note that a correction notice was issued for the proposed rule to address the misalignment of certain text between the final draft version of the proposed rule approved for publication and the published version in the **Federal Register**. See 85 FR 38107 (June 25, 2020). Since publishing the correction notice, an additional error between the two versions was identified. When describing the current HHS–RADV error methodology in the proposed rule at 85 FR 33599, the upper bound of the confidence interval was incorrectly published as  $U B_G = \mu\{GF R_G\} - \text{sigma\_cutoff} * Sd\{GF R_G\}$ . This formula should have instead been published as  $U B_G = \mu\{GF R_G\} + \text{sigma\_cutoff} * Sd\{GF R_G\}$ .

<sup>18</sup> For examples of PPACA provisions appropriating funds, see PPACA secs. 1101(g)(1), 1311(a)(1), 1322(g), and 1323(c). For examples of PPACA provisions authorizing the appropriation of funds, see PPACA secs. 1002, 2705(f), 2706(e), 3013(c), 3015, 3504(b), 3505(a)(5), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), and 5309(b).

<sup>19</sup> See 42 U.S.C. 18063.

<sup>20</sup> Compare 42 U.S.C. 18063 (failing to specify source of funding other than risk adjustment charges), with 42 U.S.C. 1395w–116(c)(3) (authorizing appropriations for Medicare Part D risk adjusted payments); 42 U.S.C. 1395w–115(a) (establishing “budget authority in advance of appropriations Acts” for Medicare Part D risk adjusted payments).

<sup>21</sup> The 2019 RADV White Paper is available at: <https://www.cms.gov/files/document/2019-hhs-risk-adjustment-data-validation-hhs-radv-white-paper>.

<sup>22</sup> The exception to the current prospective application of HHS–RADV results is for exiting issuers identified as positive error rate outliers, whose HHS–RADV results are applied to the risk scores and transfer amounts for the benefit year being audited. See the 2020 Payment Notice, 84 FR at 17503–17504.

<sup>23</sup> As part of the Administration’s efforts to combat the Coronavirus Disease 2019 (COVID–19), we announced the postponement of the 2019 benefit year HHS–RADV process. See <https://www.cms.gov/files/document/2019-HHS-RADV->

expected COVID-19 to affect chart retrieval and provider documentation within the chart. One commenter did not see a need to further delay the stabilizing measures in the proposed rule due to COVID-19.

**Response:** Recognizing the need for providers and provider organizations to focus exclusively on caring for patients during the COVID-19 public health emergency, we postponed the start of 2019 benefit year HHS-RADV activities.<sup>27</sup> As recently announced, IVA samples for 2019 benefit year HHS-RADV will be released in January 2021 and we anticipate 2020 benefit year HHS-RADV will commence as usual with the release of IVA samples in May 2021.<sup>28</sup> We continue to monitor the COVID-19 pandemic, including potential medical record retrieval issues and will consider whether additional flexibilities for HHS-RADV are appropriate. However, we are not codifying or finalizing any specific COVID-19 policies in this rulemaking.

**Comments:** Some commenters who supported the proposed error rate calculation changes asked HHS to also apply the changes to the 2017 and 2018 benefit years of HHS-RADV. A different commenter opposed applying the proposed changes starting with the 2019 benefit year HHS-RADV, expressing the belief it would be retroactive to do so, and instead supporting the adoption of these proposals for future benefit years. Other commenters supported policies in the rule applying beginning with the 2019 benefit year.

**Response:** The policies being finalized in this rule only impact the calculation of error rates and the application of the HHS-RADV results that occur at the end of the HHS-RADV process. Because the 2019 benefit year of HHS-RADV has not begun<sup>29</sup> and, under the updated timeline, the calculation of the error rates for 2019 benefit year of HHS-RADV will not occur until February 2022, we disagree that applying the error rate calculation refinements finalized in this rule to the 2019 benefit year would be retroactive. Further, for the reasons outlined in the proposed rule and this rule, we believe these refinements are important and should be applied as soon as practicable. However, we believe that application of

this rule to 2017 and 2018 benefit years of HHS-RADV would not be appropriate because the applicable error rate calculations are complete.<sup>30 31</sup> We are therefore applying the error rate calculation modifications finalized in this rule beginning with the 2019 benefit year of HHS-RADV, as proposed. Similarly, for the application of HHS-RADV results, in light of the delay of 2019 benefit year HHS-RADV and for the reasons outlined below in Section II.B., we are finalizing the policy to begin applying HHS-RADV results to the benefit year audited beginning with the 2020 benefit year which is as soon as practicable.<sup>32</sup>

#### A. Error Rate Calculation Methodology

HHS recognizes that variation in provider documentation of enrollees' health status across provider types and groups results in natural variation and validation errors. Therefore, in the 2019 Payment Notice final rule,<sup>33</sup> HHS adopted the current error rate calculation methodology to evaluate material statistical deviation in failure rates. The current methodology was adopted to avoid adjusting issuers' risk scores and transfers due to expected variation and error. Instead, HHS amends an issuer's risk score only when the issuer's failure rate materially deviates from a statistically meaningful national metric. HHS defines the national statistically meaningful metric as the weighted mean and standard deviation of the failure rate calculated based on all issuers' HHS-RADV results. Each issuer's failure rates are compared to these national metrics to determine whether the issuer's failure rate is an outlier. Based on outlier issuers' failure rate results, their error

rates are calculated and applied to their plan liability risk scores.<sup>34</sup>

In response to comments received on the 2019 RADV White Paper and to help put the proposed changes in context, the proposed rule outlined the current error rate calculation methodology.<sup>35</sup> This included information on how HHS uses outlier issuer group failure rates to adjust enrollee risk scores, calculates an outlier issuer's error rate, and applies that error rate to the outlier issuer's plan liability risk score.

Consistent with 45 CFR 153.350(c), HHS applies the outlier issuer's error rate to adjust that issuer's applicable benefit year plan liability risk score.<sup>36</sup> This risk score change, which also impacts the state market average risk score, is then used to adjust the applicable benefit year's risk adjustment transfers for the applicable state market risk pool. Due to the budget-neutral nature of the HHS-operated risk adjustment program, adjustments to one issuer's risk scores and risk adjustment transfers based on HHS-RADV findings will affect other issuers in the state market risk pool (including those who were not identified as outliers) because the state market average risk score is recalculated to reflect the change in the outlier issuer's plan liability risk score. This also means that issuers that are exempt from HHS-RADV for a given benefit year may have their risk adjustment transfers adjusted based on other issuers' HHS-RADV results.

In response to stakeholder concerns, comments to the 2019 RADV White Paper, and our analyses of 2017 benefit year HHS-RADV results, HHS proposed to modify the HCC grouping methodology used to calculate failure rates by combining certain HCCs with the same risk score coefficient for grouping purposes, and to refine the error estimation methodology to mitigate the impact of the "payment cliff" effect, in which some issuers with similar HHS-RADV findings may experience different adjustments to their risk scores and subsequently adjusted transfers. We also proposed changes to mitigate the impact of HHS-RADV

<sup>30</sup> See the 2017 HHS-RADV timeline, available at: [https://www.regtap.info/uploads/library/HRADV\\_JobAid\\_timeline\\_5CR\\_032819.pdf](https://www.regtap.info/uploads/library/HRADV_JobAid_timeline_5CR_032819.pdf); and [https://www.regtap.info/uploads/library/HRADV\\_Timeline\\_073119\\_5CR\\_120219.pdf](https://www.regtap.info/uploads/library/HRADV_Timeline_073119_5CR_120219.pdf). Also see the 2018 HHS-RADV timeline, available at: [https://www.regtap.info/uploads/library/HRADV\\_Timeline\\_030420\\_V1\\_RETIRE\\_5CR\\_041320.pdf](https://www.regtap.info/uploads/library/HRADV_Timeline_030420_V1_RETIRE_5CR_041320.pdf).

<sup>31</sup> See the 2017 and 2018 HHS-RADV results memos, available at: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/2017-Benefit-Year-HHS-Risk-Adjustment-Data-Validation-Results.pdf> and [https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/2018\\_BY\\_RADV\\_Results\\_Memo.pdf](https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/2018_BY_RADV_Results_Memo.pdf).

<sup>32</sup> As detailed below, to effectuate the transition beginning with the 2020 benefit year, we will aggregate results from the 2019 and 2020 benefit years of HHS-RADV for non-exiting issuers using the average error rate approach and apply the aggregated results to 2020 benefit year risk scores and transfers.

<sup>33</sup> See 83 FR 16930 at 16961 through 16965.

<sup>34</sup> As detailed further below, these risk score changes are then used to adjust risk adjustment transfers for the applicable state market risk pool.

<sup>35</sup> See 85 FR at 33599–33600. Also see, *supra*, note 26.

<sup>36</sup> Exiting positive error rate outlier issuer risk score error rates are currently applied to the plan liability risk scores and risk adjustment transfer amounts for the benefit year being audited. As detailed in Section II.B, we are finalizing the proposed transition from the prospective application of HHS-RADV results such that risk score error rates will also be applied to the benefit year being audited beginning with the 2020 benefit year of HHS-RADV for non-exiting issuers.

<sup>27</sup> <https://www.cms.gov/files/document/2019-HHS-RADV-Postponement-Memo.pdf>.

<sup>28</sup> See the "2019 Benefit Year HHS-RADV Activities Timeline" [https://www.regtap.info/uploads/library/HRADV\\_Timeline\\_091020\\_5CR\\_091020.pdf](https://www.regtap.info/uploads/library/HRADV_Timeline_091020_5CR_091020.pdf).

<sup>29</sup> As noted above, the start of the 2019 benefit year HHS-RADV process was postponed until the 2021 calendar year due to the COVID-19 public health emergency.

adjustments that result from negative error rate outlier issuers with negative failure rates. After consideration of comments, we are finalizing the refinements to the error rate calculation, as proposed, beginning with the 2019 benefit year of HHS–RADV. These targeted policies are intended as interim, incremental measures while we continue to analyze HHS–RADV results and consider potential further refinements and changes to the HHS–RADV methodology, including potential significant changes to the outlier determination process and the error rate methodology, for future benefit years.

#### 1. HCC Grouping for Failure Rate Calculation

HHS groups medical conditions in multiple distinct ways during the risk adjustment and HHS–RADV processes.<sup>37</sup> For risk adjustment model development, this includes: (1) The hierarchies of HCCs, (2) HCC coefficient estimation groups, (3) *a priori* stability constraints, and (4) hierarchy violation constraints. For HHS–RADV, medical conditions are grouped for the HHS–RADV HCC failure rate groups. These grouping processes are not concurrent. More specifically, the grouping processes related to model development are implemented prior to the benefit year and the HHS–RADV HCC failure rate groups are implemented after the benefit year. Our experience in the initial years of HHS–RADV found that differences among these grouping processes interact in varying ways and may result in greater or lesser HHS–RADV adjustments than may be warranted in certain circumstances.

The first grouping of medical conditions—HCCs—is used to aggregate thousands of standard disease codes into medically meaningful but statistically manageable categories. HCCs in the 2019 benefit year HHS risk adjustment models were derived from ICD–9–CM codes<sup>38</sup> that are aggregated into diagnostic groups (DXGs), which are in turn aggregated into broader condition categories (CCs). Then, clinical hierarchies are applied to the CCs, so that an enrollee receives an increase to their risk score for only the most severe manifestation among related diseases that may appear in their medical claims data on an issuer’s EDGE server.<sup>39</sup> Condition categories become HCCs once these hierarchies are imposed.

As noted previously, for a given hierarchy, if an enrollee has more than one HCC recorded in an issuer’s EDGE server, only the most severe of those HCCs will be applied for the purposes of the risk adjustment model and plan liability risk score calculation. Although HCCs reflect hierarchies among related disease categories, multiple HCCs can accumulate for enrollees with unrelated diseases; that is, the model is “additive.” For example, an enrollee with both diabetes and asthma would have (at least) two separate HCCs coded and the predicted cost for that enrollee will reflect increments for both conditions.

In the risk adjustment models, estimated coefficients of the various HCCs within a hierarchy ensure that more severe and expensive HCCs within that hierarchy receive higher risk factors than less severe and less expensive

HCCs. Additionally, as a part of the recalibration of the risk adjustment models, HHS has grouped some HCCs such that the coefficients of two or more HCCs are equal in the fitted risk adjustment models and only one model factor is assigned to an enrollee regardless of the number of HCCs from that group present for that enrollee on the issuer’s EDGE server,<sup>40</sup> giving rise to the second set of condition groupings used in risk adjustment. We impose these HCC coefficient estimation groups for a number of reasons, including the limitation of diagnostic upcoding by severity within an HCC hierarchy and the reduction of additivity within disease groups (but not across disease groups) in order to decrease the sensitivity of the models to coding proliferation.

Although some of these HCC coefficient estimation groups occur within hierarchies, some HCC coefficient estimation groups include HCCs that do not share a hierarchy. Within an HCC coefficient estimation group, each HCC will have the same coefficient in our risk adjustment models. However, as with hierarchies, only one risk marker is triggered by the presence of one or more HCCs in the HCC coefficient estimation groups. These HCC coefficient estimation groups are identified in DIY Software Table 6 for the adult models and DIY Software Table 7 for the child models. The adult model HCC coefficient estimation groups for the V05 risk adjustment models<sup>41</sup> are displayed in Table 1:

TABLE 1—HCC COEFFICIENT ESTIMATION GROUPS FROM ADULT RISK ADJUSTMENT MODELS V05

| HHS HCC  | V05 HHS–HCC label                                                   | Adult model HCC coefficient estimation group |
|----------|---------------------------------------------------------------------|----------------------------------------------|
| 19 ..... | Diabetes with Acute Complications .....                             | G01                                          |
| 20 ..... | Diabetes with Chronic Complications .....                           | G01                                          |
| 21 ..... | Diabetes without Complication .....                                 | G01                                          |
| 26 ..... | Mucopolysaccharidosis .....                                         | G02A                                         |
| 27 ..... | Lipidoses and Glycogenosis .....                                    | G02A                                         |
| 29 ..... | Amyloidosis, Porphyria, and Other Metabolic Disorders .....         | G02A                                         |
| 30 ..... | Adrenal, Pituitary, and Other Significant Endocrine Disorders ..... | G02A                                         |
| 54 ..... | Necrotizing Fasciitis .....                                         | G03                                          |
| 55 ..... | Bone/Joint/Muscle Infections/Necrosis .....                         | G03                                          |
| 61 ..... | Osteogenesis Imperfecta and Other Osteodystrophies .....            | G04                                          |

<sup>37</sup> See 85 FR at 33601.

<sup>38</sup> In the 2021 Payment Notice, we finalized several updates to the HHS–HCC clinical classification by using more recent claims data to develop updated risk factors that apply beginning with the 2021 benefit year risk adjustment models. See 85 FR at 29175.

<sup>39</sup> The process for creating hierarchies is an iterative process that considers severity, as well as costs of the HCCs in the hierarchies and clinical

input, among other factors. For information on this process, see section 2.3 of the June 17, 2019 document “Potential Updates to HHS–HCCs for the HHS-operated Risk Adjustment Program” (2019 HHS–HCC Potential Updates Paper), available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Potential-Updates-to-HHS-HCCs-HHS-operated-Risk-Adjustment-Program.pdf#page=11>.

<sup>40</sup> As described in the “Potential Updates to HHS–HCCs for the HHS-operated Risk Adjustment

Program” Paper, available at “<https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Potential-Updates-to-HHS-HCCs-HHS-operated-Risk-Adjustment-Program.pdf#page=11>.”

<sup>41</sup> The shorthand “V05” refers to the current HHS–HCC classification for the HHS risk adjustment models, which applies through the 2020 benefit year. V07 is the HHS–HCC classification for the HHS risk adjustment models, which applies beginning with the 2021 benefit year.

TABLE 1—HCC COEFFICIENT ESTIMATION GROUPS FROM ADULT RISK ADJUSTMENT MODELS V05—Continued

| HHS HCC   | V05 HHS–HCC label                                                                                   | Adult model HCC coefficient estimation group |
|-----------|-----------------------------------------------------------------------------------------------------|----------------------------------------------|
| 62 .....  | Congenital/Developmental Skeletal and Connective Tissue Disorders .....                             | G04                                          |
| 67 .....  | Myelodysplastic Syndromes and Myelofibrosis .....                                                   | G06                                          |
| 68 .....  | Aplastic Anemia .....                                                                               | G06                                          |
| 69 .....  | Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn .....                             | G07                                          |
| 70 .....  | Sickle Cell Anemia (Hb-SS) .....                                                                    | G07                                          |
| 71 .....  | Thalassemia Major .....                                                                             | G07                                          |
| 73 .....  | Combined and Other Severe Immunodeficiencies .....                                                  | G08                                          |
| 74 .....  | Disorders of the Immune Mechanism .....                                                             | G08                                          |
| 81 .....  | Drug Psychosis .....                                                                                | G09                                          |
| 82 .....  | Drug Dependence .....                                                                               | G09                                          |
| 106 ..... | Traumatic Complete Lesion Cervical Spinal Cord .....                                                | G10                                          |
| 107 ..... | Quadriplegia .....                                                                                  | G10                                          |
| 108 ..... | Traumatic Complete Lesion Dorsal Spinal Cord .....                                                  | G11                                          |
| 109 ..... | Paraplegia .....                                                                                    | G11                                          |
| 117 ..... | Muscular Dystrophy .....                                                                            | G12                                          |
| 119 ..... | Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders ..... | G12                                          |
| 126 ..... | Respiratory Arrest .....                                                                            | G13                                          |
| 127 ..... | Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes .....                | G13                                          |
| 128 ..... | Heart Assistive Device/Artificial Heart .....                                                       | G14                                          |
| 129 ..... | Heart Transplant .....                                                                              | G14                                          |
| 160 ..... | Chronic Obstructive Pulmonary Disease, Including Bronchiectasis .....                               | G15                                          |
| 161 ..... | Asthma .....                                                                                        | G15                                          |
| 187 ..... | Chronic Kidney Disease, Stage 5 .....                                                               | G16                                          |
| 188 ..... | Chronic Kidney Disease, Severe (Stage 4) .....                                                      | G16                                          |
| 203 ..... | Ectopic and Molar Pregnancy, Except with Renal Failure, Shock, or Embolism .....                    | G17                                          |
| 204 ..... | Miscarriage with Complications .....                                                                | G17                                          |
| 205 ..... | Miscarriage with No or Minor Complications .....                                                    | G17                                          |
| 207 ..... | Completed Pregnancy With Major Complications .....                                                  | G18                                          |
| 208 ..... | Completed Pregnancy With Complications .....                                                        | G18                                          |
| 209 ..... | Completed Pregnancy with No or Minor Complications .....                                            | G18                                          |

The HHS–HCC model also incorporates a small number of “*a priori* stability constraints” to stabilize estimates that might vary greatly due to small sample size. These *a priori* stability constraints differ from the HCC coefficient estimation groups in how the corresponding estimates are counted. In contrast to HCC coefficient estimation groups, with *a priori* stability constraints, a person can have more than one indicated condition (each with the same coefficient value) as long as the HCCs are not in the same hierarchy. Prior to the 2021 benefit year recalibration, only one *a priori* stability constraint was applied to the models, and this constraint was only applied to the child models.<sup>42</sup>

HCC coefficient estimation groups and *a priori* stability constraints are both applied in the initial phase of risk adjustment regression modeling. Other constraints may be applied in later stages depending on regression results.

<sup>42</sup> In the 2021 Payment Notice (85 FR at 29178), we finalized an additional *a priori* stability constraint to the child models, constraining HCC 218 *Extensive Third Degree Burns* and HCC 223 *Severe Head Injury* to have the same risk adjustment coefficient due to small sample size, and revised the single transplant stability constraint in the child models to be two stability constraints to better distinguish transplant cost differences.

For example, HCCs may be constrained equal to each other if there is a hierarchy violation (a lower severity HCC has a higher estimate than a higher severity HCC in the same hierarchy). HCC coefficients may also be constrained to 0 if the estimates fitted by the regression model are negative.

The final set of groupings is imposed during the error estimation stage of the HHS–RADV process. In this process, HCCs are categorized into low, medium, and high HCC failure rate groups. To create the HCC failure rate groupings for HHS–RADV, the first step is to calculate the national average failure rate for each HCC individually. The second step involves ranking HCCs in order of their failure rates and then dividing them into three groups—a low, medium, and high failure rate group—such that the total frequency of HCCs in each group nationally as recorded in EDGE data across all IVA samples (or SVA samples, if applicable) are roughly equal. These HCC failure rate groups form the basis of the failure rate outlier determination process, with each failure rate group receiving an independent assessment of outlier status for each issuer.<sup>43</sup>

<sup>43</sup> For a table of the HCC failure rate groupings for 2017 benefit year HHS–RADV, see the 2019 RADV White Paper, Appendix E.

Based on our experience with the initial years of HHS–RADV, HHS observed that, in certain situations, the risk adjustment HCC hierarchies and HCC coefficient estimation groups can influence and interact with the HHS–RADV HCC failure rate groupings in ways that could result in misalignments.<sup>44</sup>

Based on HHS's initial analysis of the 2017 benefit year HHS–RADV results, and in response to comments to the 2019 RADV White Paper, HHS considered an option in the proposed rule to address the influence of the HCC hierarchies and HCC coefficient estimation groups on the HCC failure rate groupings in HHS–RADV. We proposed to modify the creation of HHS–RADV HCC failure rate groupings to place all HCCs that share an HCC coefficient estimation group in the adult risk adjustment models (see Table 1 for the list of the HCC coefficient estimation groups in the V05 classification) into the same HCC failure rate grouping. Specifically, we proposed that, when HHS calculates EDGE and IVA frequencies for each individual HCC, we would aggregate HCCs that are in the same HCC coefficient estimation group

<sup>44</sup> See 85 FR at 33603–33604. Also see Section 3.3 of the 2019 RADV White Paper.

in the adult risk adjustment models (and, therefore, have coefficients constrained to be equal to one another) into one “Super” HCC, prior to calculating individual HCC failure rates and sorting the HCCs into low, medium, and high failure rate groups for HHS–RADV. These new frequencies, including the aggregated frequencies of HCC coefficient estimation groups and the individual frequencies of all other HCCs that are not aggregated with other HCCs because they are not in any coefficient estimation groups, would be considered frequencies of “Super HCCs.”

Under the proposed methodology, we would modify the current HCC failure rate grouping methodology as follows:

$$FR_c = 1 - \frac{freqIVA_c}{freqEDGE_c}$$

Where:

$c$  is the index of the  $c$ th Super HCC;  
 $freqEDGE_h$  is the frequency of an HCC  $h$  occurring in EDGE data; that is, the number of sampled enrollees recording HCC  $h$  in EDGE data across all issuers participating in HHS–RADV;  
 $freqEDGE_c$  is the frequency of a Super HCC  $c$  occurring in EDGE data across all issuers participating in HHS–RADV; that is, the sum of  $freqEDGE_h$  for all HCCs that share an HCC coefficient estimation group in the adult models:

$$freqEDGE_c = \sum_h freqEDGE_{h,c}$$

When an HCC is not in an HCC coefficient estimation group in the adult risk adjustment models, the  $freqEDGE_c$  for that HCC will be equivalent to  $freqEDGE_h$ ;  
 $freqIVA_h$  is the frequency of an HCC  $h$  occurring in IVA results (or SVA results, as applicable); that is, the number of sampled enrollees recording HCC  $h$  in IVA (or SVA, as applicable) results across all issuers participating in HHS–RADV;  
 $freqIVA_c$  is the frequency of a Super HCC  $c$  occurring in IVA results (or SVA results, as applicable) across all issuers participating in HHS–RADV; that is, the sum of  $freqIVA_h$  for all HCCs that share an HCC coefficient estimation group in the adult risk adjustment models:

$$freqIVA_c = \sum_h freqIVA_{h,c}$$

And;

$FR_c$  is the national overall (average) failure rate of Super HCC  $c$  across all issuers participating in HHS–RADV.

Then, the failure rates for all Super HCCs would be grouped according to the current HHS–RADV failure rate grouping methodology.

This approach would ensure that HCCs with the same estimated costs in the adult risk adjustment models that share an HCC coefficient estimation group do not contribute independently and additively to an issuer's failure rate

in a HCC failure rate grouping. This proposal would refine the current methodology to better identify and focus HCC failure rates used in outlier determination on actual differences in risk and costs. Our tests of this proposed policy on HHS–RADV results data revealed that between an estimated 85.2 percent (2018 data) and 98.1 percent (2017 data) of the occurrences of HCCs on EDGE belong to HCCs that would be assigned to the same failure rate groups under the proposed “Super HCC” methodology as they have been under the current methodology as seen in Table 2. Although the impact on individual issuer results may vary depending upon the accuracy of their EDGE data submissions and the rate of occurrence of various HCCs in their enrollee population, the national metrics used for HHS–RADV, that is, the weighted means and weighted standard deviations, would only be slightly affected, as seen in Table 3. The stability of these metrics and high proportion of EDGE frequencies of HCCs that would be assigned to the same failure rate group under the proposed and current sorting methodologies reflects that the most common conditions would have similar failure rates under both methodologies. However, the failure rate estimates of less common conditions may be stabilized with the proposed creation of Super HCCs by ensuring these conditions are grouped alongside more common, related conditions.

**TABLE 2: Estimated Changes in the HCC Groupings Using Super HCCs Based on Aggregates of Adult Model HCC Coefficient Estimation Groups (Using Prior Benefit Year HHS–RADV Results Data)**

| Unique Count of HCCs in Each Failure Rate Group |        | New Methodology |        |       |           |        |       |
|-------------------------------------------------|--------|-----------------|--------|-------|-----------|--------|-------|
|                                                 |        | 2017 Data       |        |       | 2018 Data |        |       |
|                                                 |        | Low             | Medium | High  | Low       | Medium | High  |
| Current Methodology                             | Low    | 31              | 1      | 1     | 27        | 5      | 1     |
|                                                 | Medium | 2               | 29     | 4     | 1         | 27     | 4     |
|                                                 | High   | 1               | 5      | 53    | 1         | 7      | 55    |
| Frequency of HCC Occurrences on EDGE            |        | New Methodology |        |       |           |        |       |
|                                                 |        | 2017 Data       |        |       | 2018 Data |        |       |
|                                                 |        | Low             | Medium | High  | Low       | Medium | High  |
| Current Methodology                             | Low    | 32.2%           | 0.0%   | 0.0%  | 26.9%     | 5.0%   | 0.0%  |
|                                                 | Medium | 0.1%            | 33.0%  | 1.0%  | 5.0%      | 27.0%  | 1.3%  |
|                                                 | High   | 0.3%            | 0.3%   | 32.9% | 0.4%      | 3.2%   | 31.3% |

In testing this proposal to create Super HCCs in HHS–RADV, we grouped HCCs in the same HCC coefficient estimation group in the adult risk adjustment models. We chose to use the adult risk adjustment models for testing because the majority of the population with HCCs in the HHS–RADV samples are subject to the adult models (88.3 percent for the 2017 benefit year; 89.1 percent for the 2018 benefit year).<sup>45</sup> As such, the adult models' HCC coefficient estimation groups will be applicable to the vast majority of enrollees and we believe that the use of HCC coefficient estimation groups present in the adult risk adjustment models sufficiently balances the representativeness and accuracy of HCC failure rate estimates across the entire population in aggregate. Therefore, we proposed to use HCC coefficient estimation groups in the adult risk adjustment models to define Super HCCs for all HHS–RADV sample enrollees, regardless of the risk adjustment model to which they are subject.

In developing this policy, we limited the grouping of risk adjustment HCCs into Super HCCs for HHS–RADV to HCC coefficient estimation groups alone and did not consider including *a priori* stability constraints or hierarchy violation constraints in the aggregation of Super HCCs.<sup>46</sup> We also did not consider hierarchy violation constraints as a part of the sorting algorithm in order to balance complexity and consistency. For example, if, in a given benefit year, the magnitudes of two coefficients that share a hierarchy happen to decrease in order of their conditions' theoretical severity, the coefficients would violate the assumptions of the hierarchy structure and would be subject to a hierarchy violation constraint in that year's risk adjustment models. However, if the magnitude of those two coefficients increase in the order of their conditions' severity in the subsequent year, as would generally be expected, the coefficients would be consistent with the assumptions of the hierarchy structure and would not be constrained to be equal as a part of a hierarchy violation constraint. Because these year-to-year changes in hierarchy violation constraints are based solely on the magnitude of each year's initial coefficient estimates, using them in the

grouping of Super HCCs would make those groupings less stable and transparent, and would reduce predictability for issuers.

Due to these considerations, we proposed to combine HCCs into Super HCCs defined only by HCC coefficient estimation groups in the adult risk adjustment models prior to sorting the HCCs into low, medium and high failure rate groups for HHS–RADV, starting with the 2019 benefit year of HHS–RADV. As proposed, these Super HCC groupings would apply to all HHS–RADV sample enrollees, regardless of the risk adjustment models to which they are subject. Once sorted into failure rate groups, the failure rates for all Super HCCs, both those composed of a single HCC and those composed of the aggregate frequencies of HCCs that share an HCC coefficient estimation group in the adult risk adjustment models, would be grouped according to the current HHS–RADV failure rate grouping methodology. We solicited comment on all aspects of this proposal. We also solicited comments on whether, in addition to the Super HCCs based on the adult risk adjustment models, HHS should create separate infant Super HCCs for each maturity and severity type in the infant risk adjustment models. Additionally, we solicited comments on whether we should consider incorporating *a priori* stability constraints from the child models or hierarchy violation constraints from the adult models when defining Super HCCs.

After consideration of the comments received, we are finalizing this policy as proposed, and will combine HCCs in HCC coefficient estimation groups in the adult risk adjustment models, which effectively have equal coefficients, into Super HCCs prior to sorting the HCCs into low, medium and high failure rate groups for HHS–RADV. This refinement to the error rate calculation will apply starting with the 2019 benefit year of HHS–RADV. These Super HCC groupings will apply to all HHS–RADV sample enrollees, regardless of the risk adjustment models to which they are subject. Therefore, although the aggregation will be based upon the adult models, enrollees subject to the child and infant models will have their HCCs included in the aggregated counts when they have an HCC that is listed as sharing a coefficient estimation group with other HCCs in the adult models. The resulting Super HCCs will then be sorted into high, medium, and low failure rate groups using the sorting process described in the applicable

benefit year's HHS–RADV Protocols.<sup>47</sup> Once sorted into failure rate groups, the failure rates for all Super HCCs, both those composed of a single HCC and those composed of the aggregate frequencies of HCCs that share an HCC coefficient estimation group in the adult risk adjustment models, will be grouped according to the current HHS–RADV failure rate grouping methodology.

*Comments:* All comments on this policy supported the proposal to adjust the HCC failure rate grouping methodology to define Super HCCs based upon the HCC coefficient estimation groups in the adult risk adjustment models. Several commenters requested we expand the proposed definition of Super HCCs to include the grouping of conditions used to create the variables for the infant models. Some of these commenters added that implementing this expansion for the infant models should be done in a way that avoids year-to-year stability concerns, if possible, while other comments requested that we publish an analysis on the impacts of such an expansion prior to implementing it.

In addition, some commenters agreed that the inclusion of *a priori* stability constraints from the child models would be inappropriate due to their additive nature, with a few of these commenters also agreeing that hierarchy violation constraints should not factor into the definitions of Super HCCs. However, other commenters requested that HHS include HCCs involved in a hierarchy violation constraint in the same Super HCC. Some commenters requested we publish an analysis on including *a priori* stability constraints as part of the process to create Super HCCs.

*Response:* We are finalizing the refinement to the HCC failure rate grouping methodology as proposed and will place all HCCs that share an HCC coefficient estimation group in the adult risk adjustment models into the same HCC failure rate grouping beginning with the 2019 benefit year of HHS–RADV. Although the aggregation will be based upon the adult models, the child

<sup>45</sup> For 2017, this was calculated after removing issuers in Massachusetts and incorporating cases where issuers failed pairwise and the SVA sub-sample was used.

<sup>46</sup> Both *a priori* stability constraints and hierarchy violation constraints are described earlier in this section (Section II.A.1) of the rule. Also see 85 FR at 33602–33603.

<sup>47</sup> See Section 11.3.1 of the 2018 HHS–RADV Protocols at [https://www.regap.info/uploads/library/HRADV\\_2018Protocols\\_070319\\_RETIRED\\_5CR\\_070519.pdf](https://www.regap.info/uploads/library/HRADV_2018Protocols_070319_RETIRED_5CR_070519.pdf) for a description of the process prior to the introduction of Super HCCs. Beginning with the 2019 benefit year of HHS–RADV, Super HCCs would take the place of HCCs in the process. The 2019 HHS–RADV Protocols have thus far only been published in part at [https://www.regap.info/uploads/library/HRADV\\_2019\\_Protocols\\_111120\\_5CR\\_111120.pdf](https://www.regap.info/uploads/library/HRADV_2019_Protocols_111120_5CR_111120.pdf). The section of the 2019 HHS–RADV Protocols pertaining to HCC grouping for failure rate calculations is not included in the current version. Once published, this section will be updated to include steps related to creation of Super HCCs.

and infant models will have their HCCs included in the aggregated counts when they have an HCC that is listed as sharing a coefficient estimation group with other HCCs in the adult models. As explained in the proposed rule and in this rule, we believe this change mitigates the misalignments that occur when HCCs with the same risk score coefficient are sorted into different HCC failure rate groupings while increasing the stability of year-to-year HCC failure rate grouping assignments. To promote fairness and ensure the integrity of the program, we do not believe that a RADV finding that reflects an EDGE data miscoding of one condition as another condition from the same coefficient estimation group should contribute to any of an issuer's three failure rates. This refinement to the HHS–RADV failure rate grouping methodology ensures that these types of HCC miscodings with no risk score impact do not impact an issuer's HHS–RADV error rate.

We appreciate the comments about the creation of separate infant Super HCCs and investigated the potential adoption of separate infant model terms. Our analysis found that such an approach would likely result in more year-to-year uncertainty and instability due to the relatively small sample size for some infant model terms—notably, only around 5 percent of 2017<sup>48</sup> and 2018 HHS–RADV sample enrollees in strata 1 through 9 with EDGE HCCs were infants. As a result, HCC counts and failure rates for potential infant-only Super HCCs would be more likely to vary due to random selection, yielding less year-to-year stability among HCC failure rate group assignments. Therefore, in the interest of stability, we believe that basing the definitions of Super HCCs on coefficient estimation groups from the adult risk adjustment models is more appropriate. As noted earlier, the majority of the population with HCCs in the HHS–RADV samples are subject to the adult models (88.3 percent for the 2017 benefit year; 89.1 percent for the 2018 benefit year).<sup>49</sup>

We also appreciate the comments regarding inclusion of hierarchy violation constraints when creating Super HCCs, such that HCCs involved in a hierarchy violation constraint would be included in the same Super HCC. As explained in the proposed rule, we did not consider hierarchy violation

constraints when developing the Super HCC proposal in order to balance complexity and consistency, since these constraints can change from year-to-year as a natural result of the annual recalibration updates to the model coefficients. Similar to the concerns for the separate infant model Super HCCs, these year-to-year changes would make HCC groupings for these HCCs less stable and transparent, and would reduce predictability for issuers. Further, we note that hierarchy violation constraints may occur in a single metal-level and age group in just one of the three data years used to create the blended coefficients. For example, the 2021 benefit year coefficients reflect a weighted average of coefficients calculated separately from 2016, 2017, and 2018 benefit year EDGE data. If there is a hierarchy violation among three HCCs that share a hierarchy in the silver adult model fitted to 2018 EDGE data, a hierarchy violation constraint would be applied to the three coefficients calculated from that data set alone, excluding any coefficients from the 2016 and 2017 benefit years, and any other metal levels and age groups from the 2018 benefit year. As a result, when the coefficients from the separate data years are blended, the hierarchy violation constraint may not be apparent in the final coefficients and the final coefficients for the HCCs in the affected hierarchy may differ from one another.

Additionally, even if a hierarchy violation constraint is necessary for the same hierarchy in all three data years, and is therefore apparent in the final risk adjustment coefficients, the hierarchy violation constraint could involve a very small number of enrollees specific to a particular metal level and age group model (for example, the gold metal level child model). Although the coefficients involved in such a hierarchy violation constraint would all be equal to one another, the coefficients from age group models unaffected by hierarchy violation constraints are likely to differ according to the severity of the HCCs in the hierarchy, and it would be appropriate to capture the resulting risk score differences in HHS–RADV. Therefore, a methodology that included hierarchy violation constraints in the definition of Super HCCs would have to keep the relevant HCCs in the applicable metal level and age group model affected by the hierarchy violation constraints separate from the same HCCs in metal levels and age group models that are unaffected. This would result in individual Super HCCs dedicated to only the HCCs affected by a given

hierarchy violation constraint from HHS–RADV sample enrollees subject to the affected metal level and age group model. As such, the individual Super HCC failure rate calculation for that hierarchy violation constraint would be based on a very small sample, leading to instability for the HCC failure rate group assignment for that hierarchy violation constraint. It would also increase the complexity associated with adoption of this refinement to the HCC failure rate grouping methodology. In contrast, coefficient estimation groups are consistent across all five metal level adult models, and are almost identical to the coefficient estimation groups across all five metal level child models. As such, it is much more appropriate to define Super HCCs for all enrollees based on the adult coefficient estimation groups, because nearly all enrollees with an EDGE miscoding between two HCCs in a coefficient estimation group would be assigned the same risk score for either HCC. This consistency allows us to utilize a much larger sample size during the calculation of Super HCC-specific failure rates, namely, the entire HHS–RADV sample, resulting in more stable failure rate estimates and HCC failure rate group assignments. Defining Super HCCs based on the adult coefficient estimation groups is also easy to implement as an interim measure to address the identified misalignment that occurs in situations where HCCs in the same HCC coefficient estimation group are sorted into different HCC failure rate groupings.

Finally, we appreciate the comments requesting more analysis on including *a priori* stability constraints from the child models in the definition of Super HCCs. For similar reasons to those noted in the discussion of the hierarchy violation constraints and variables from infant models, including *a priori* stability constraints from the child models in the definition of Super HCCs would result in very small sample sizes for the purposes of determining the Super HCC-level failure rate prior to sorting into HCC failure rate groups. As such, our analysis of the inclusion of *a priori* stability constraints for the child models found that it would likely result in less year-to-year uncertainty in that model than basing Super HCCs on coefficient estimation groups alone. Moreover, HCCs subject to *a priori* stability constraints are additive in the risk adjustment models, whereas HCCs within coefficient estimation groups are not.<sup>50</sup> This difference is due to the fact

<sup>48</sup> For 2017, this was calculated after removing issuers in Massachusetts and incorporating cases where issuers failed pairwise agreement and the SVA sub-sample was used.

<sup>49</sup> Ibid.

<sup>50</sup> The additive nature of HCCs subject to *a priori* stability constraints as opposed to other groupings



that many of the *a priori* stability constraints reflect unrelated conditions, and therefore, a miscoding of one HCC within an *a priori* stability constraint would not be expected to impact the likelihood that another HCC in that *a priori* stability constraint would also be miscoded. In contrast, coefficient estimation groups reflect related conditions that could conceivably be miscoded as one another on EDGE. Therefore, we do not believe that it is appropriate to include *a priori* stability constraints from the child models in the definition of Super HCCs.

**Comments:** A few commenters supported the proposed changes as valuable interim measures, but stated that the HCC failure rate grouping methodology may require additional improvements in the future and asked that HHS continue to analyze and propose refinements to the HCC grouping process for HHS–RADV. Some of these commenters emphasized that stability of HCC failure rate group assignment from year-to-year should be a priority when considering potential future changes.

**Response:** We appreciate these comments. As noted in the proposed rule, the Super HCC refinement is intended to address the misalignment that occurs in situations where HCCs in the same HCC coefficient estimation group are sorted into different HCC failure rate groupings on an interim basis while we continue to assess different longer-term options. We remain committed to ensuring the integrity and reliability of HHS–RADV and agree that year-to-year stability is an important factor to consider when analyzing potential future changes. We continue to explore potential modifications to this program, including to the HCC grouping methodology, for future benefit years and will propose any such changes through notice-and-comment rulemaking.

**Comments:** Several commenters requested that HHS release more information about the HCC failure rate grouping proposal to create Super HCCs. This included requests for more information about the degree to which validation failures relate to hierarchies for 2018 HHS–RADV, analysis on year-to-year stability, and a further explanation of the proposed refinement

to the HCC failure rate grouping methodology.

**Response:** Once the data became available, we conducted an additional analysis of the Super HCC proposal using 2018 benefit year HHS–RADV results. This further analysis provided roughly the same figure for the proportion of newly identified HCCs which could be attributed to a miscoding of an HCC in the same hierarchy, or in the same coefficient estimation group, as the analysis of 2017 benefit year HHS–RADV results used to develop the Super HCC proposal, namely, about 1/3rd of newly identified HCCs. Among non-validated HCCs, the rate that could be attributed to miscoding of an HCC in the same hierarchy was slightly higher in our analysis of 2018 data (about 1/7th of non-validated HCCs) than it was for 2017 data (about 1/8th of non-validated HCCs). Additionally, in response to comments, we note that in both 2017 and 2018 HHS–RADV results, approximately 1/3rd of HCCs that could be attributed to miscoding of an HCC in the same hierarchy also shared a coefficient estimation group.<sup>51</sup> The refinement to the HCC failure group rate methodology finalized in this rule will ensure that these HCCs will have no impact on failure rates. More specifically, adoption of this change for HCCs in the same coefficient group ensures they are not sorted into different HCC failure rate groupings and avoids making HHS–RADV adjustments to risk scores when they are not conceptually warranted.

In response to the comments, we also provide the following additional example regarding the calculation of a Super's HCC failure rate using  $freqEDGE_c$ ,  $freqIVA_c$ , and  $FR_c$  values for Super HCCs.<sup>52</sup> HCC 54 *Necrotizing Fasciitis* and HCC 55 *Bone/Joint/Muscle Infections/Necrosis* share a HCC coefficient estimation group, and therefore those HCC failure rates would be grouped together to form a Super HCC. For example, if  $freqEDGE_{h54}$  is 30 and  $freqEDGE_{h55}$  is 70, nationally, and if  $freqIVA_{h54}$  is 15 and  $freqIVA_{h55}$  is 65, nationally, then  $freqEDGE_{c54\&55}$  is 100 and  $freqIVA_{c54\&55}$  is 80, yielding  $FR_{c54\&55} = 1 - 80/100 = 20\%$ . This is in contrast to cases such as HCC 1 *HIV/*

*AIDS*, which does not share a coefficient estimation group with any other HCCs. In this second example,  $freqEDGE_c$  will be equal to  $freqEDGE_{h1}$ ,  $freqIVA_c$  will be equal to  $freqIVA_{h1}$ , and  $FR_c$  will be equal to  $FR_{h1}$ , the value of the national failure rate for HCC 1.

As explained in the proposed rule, after the calculation of  $freqEDGE_c$ ,  $freqIVA_c$ , and  $FR_c$ , we will sort the Super HCCs—both those composed of a single HCC and those composed of the aggregate frequencies of HCCs that share an HCC coefficient estimation group in the adult models—using the sorting process under the current HHS–RADV failure rate grouping methodology. The sorting process and failure rate grouping methodology are described in the HHS–RADV Protocols.<sup>53</sup> Specifically, HHS will calculate the HCC failure rate group for each Super HCC using the following method:

- Create a list containing each Super HCC and its associated failure rate.
- Sort Super HCCs from lowest to highest failure rate ( $FR_c$ ).
- Put the Super HCC with the lowest failure rate in the low failure rate group, and update the size of this group ( $freqEDGE_{low}$ ) so that it is equal to  $freqEDGE_{c1}$ , that is, the value of  $freqEDGE_c$  for the first Super HCC from the sorted list. Put the next Super HCC from the sorted list in the low failure rate group, and update the group size to  $freqEDGE_{low} + freqEDGE_{ci}$ , the value of  $freqEDGE_c$  for the *i*-th Super HCC from the sorted list. Repeat this sorting process until the size of  $freqEDGE_{low}$  reaches or exceeds 1/3rd of the total frequency of HCCs recorded on EDGE ( $\Sigma freqEDGE_h$  across all HCCs, which is equal to  $\Sigma freqEDGE_c$  across all Super HCCs).
- After the low failure rate group has reached the 1/3rd cut off, HHS will put the next Super HCC from the sorted list into the medium failure rate group, and will update the size of this group ( $freqEDGE_{medium}$ ) so that it is equal to  $freqEDGE_{ci}$ . We will then put the next Super HCC from the sorted list into the medium failure rate group, and update the group size to  $freqEDGE_{medium} +$

<sup>53</sup> See Section 11.3.1 of the 2018 HHS–RADV Protocols at [https://www.regap.info/uploads/library/HRADV\\_2018Protocols\\_070319\\_RETIREDCR\\_070519.pdf](https://www.regap.info/uploads/library/HRADV_2018Protocols_070319_RETIREDCR_070519.pdf) for a description of the process prior to the introduction of Super HCCs. Beginning with the 2019 benefit year of HHS–RADV, Super HCCs would take the place of HCCs in the process. The 2019 HHS–RADV Protocols have thus far only been published in part at [https://www.regap.info/uploads/library/HRADV\\_2019\\_Protocols\\_111120\\_5CR\\_111120.pdf](https://www.regap.info/uploads/library/HRADV_2019_Protocols_111120_5CR_111120.pdf). The section of the 2019 HHS–RADV Protocols pertaining to HCC grouping for failure rate calculations is not included in the current version. Once published, this section will be updated to include steps related to creation of Super HCCs.

of HCCs in the risk adjustment models is discussed in greater detail in the proposed rule (85 FR 33605). We have also previously discussed this feature of *a priori* stability constraints in the 2019 HHS–HCC Potential Updates Paper, available at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Potential-Updates-to-HHS-HCCs-HHS-operated-Risk-Adjustment-Program.pdf#page=11>.

<sup>51</sup> See Table 2 for a further comparison and analysis of the estimated changes reflecting implementation of the Super HCC refinement using 2017 and 2018 HHS–RADV data. Also see Tables 3 and 4 for a further analysis and comparison of the estimated changes reflecting implementation of the policies finalized in this rule using both 2017 and 2018 benefit year HHS–RADV results.

<sup>52</sup> Commenters should also refer to the illustrative example in the proposed rule. See 85 FR at 33605.

$freqEDGE_{ci}$ . We will repeat this process until  $freqEDGE_{low} + freqEDGE_{medium}$  reaches or exceeds 2/3rds of the total number of HCCs recorded on EDGE ( $\Sigma freqEDGE_h$  across all HCCs, which is equal to  $\Sigma freqEDGE_c$  across all Super HCCs).

- The remaining Super HCCs, those with the highest failure rates, will then be assigned to the high failure rate group.

Because the inclusion of the final  $freqEDGE_{ci}$  in a given failure rate group may result in the total frequency for that group going beyond 1/3rd of the total  $\Sigma freqEDGE_c$ , consistent with the current sorting process and methodology, HHS will then reexamine the HCC allocations between failure rate groups to ensure an even distribution of HCCs between failure rate groups such that each HCC failure rate group contains as close as possible to 1/3rd of the HCCs reported in EDGE. To accomplish this, we will first identify the final Super HCCs in the low and medium failure rate groups that result in a total  $freqEDGE_{low}$  or  $freqEDGE_{medium}$  that exceeds 1/3rd of the total  $\Sigma freqEDGE_c$ . Then we will generate multiple grouping scenarios such that the identified Super HCCs that cause  $freqEDGE_{low}$  or  $freqEDGE_{medium}$  to exceed 1/3rd of the total  $\Sigma freqEDGE_c$  are instead included in the next higher failure rate group. These multiple grouping scenarios will contain all possible assignments of the two Super HCCs that cross the 1/3rd boundary for the low and medium failure rate groupings. For each grouping scenario, we will then calculate the potential values of  $freqEDGE_{low}$ ,  $freqEDGE_{medium}$ , and  $freqEDGE_{high}$  and then calculate the absolute distance between in each HCC failure rate group and 1/3rd. HHS will then choose the scenario that is closest to an exact 1/3rd split of HCC frequencies across groups. This scenario will be used as the final HCC failure rate grouping assignment for that HHS–RADV benefit year.

## 2. “Payment Cliff” Effect

The HHS–RADV error rate calculation methodology is based on the identification of outliers, as determined using certain national thresholds. Those thresholds are used to determine whether an issuer is an outlier and the error rate that will be used to adjust outlier issuers’ risk scores. Under the current methodology, 1.96 standard deviations on both sides of the confidence interval around the weighted HCC group means are the thresholds used to determine whether an issuer is an outlier. In practice, these thresholds

mean that an issuer with failure rates outside the 1.96 standard deviations range for any of the HCC failure groups is deemed an outlier and receives an adjustment to its risk score, while an issuer with failure rates inside the 1.96 standard deviations range for all groups receives no adjustment to its risk score.<sup>54</sup>

Some stakeholders have expressed concern that issuers with failure rates that are just outside of the confidence intervals receive an adjustment to their risk scores, even though these issuers’ failure rates may not be significantly different from the failure rates of issuers just inside the confidence intervals who receive no risk score adjustment, creating a “payment cliff” or “leap frog” effect. For example, an issuer with a low HCC group failure rate of 23.9 percent would be considered a positive error rate outlier for that HCC group based on the 2017 benefit year national failure rate statistics, because the upper bound confidence interval for the low HCC group is 23.8 percent. At the same time, another issuer with a low HCC group failure rate of 23.7 percent would receive no adjustment to its risk score as a result of HHS–RADV. While this result is due to the nature of establishing and using a threshold to identify outliers, some stakeholders suggested that HHS could mitigate this effect by calculating error rates based on the position of the bounds of the confidence interval for the HCC group and not on the position of the weighted mean for the HCC group.

While HHS considered several possible methods to address the payment cliff,<sup>55</sup> we proposed to address the payment cliff by adding a sliding scale adjustment to the current error rate calculation, such that the adjustments applied would vary based on the outlier issuer’s distance from the mean and the farthest outlier threshold. This proposed approach would employ additional thresholds to create a smoothing of the error rate calculation beyond what the current methodology allows and help reduce the disparity of risk score adjustments by using a linear adjustment.<sup>56</sup> We proposed to make this

<sup>54</sup> An issuer with no error rate would not have its risk score adjusted due to HHS–RADV, but that issuer may have its risk adjustment transfer impacted if there is another issuer(s) in the state market risk pool that is an outlier.

<sup>55</sup> See, e.g., section 4.4.4 and 4.4.5 of the 2019 RADV White Paper.

<sup>56</sup> In the 2020 Payment Notice, we stated that we may consider alternative options for error rate adjustments, such as using multiple or smoothed confidence intervals for outlier identification and risk score adjustments. See 84 FR at 17507.

modification beginning with 2019 benefit year HHS–RADV.

To apply the sliding scale adjustment, we proposed to modify the calculation of the group adjustment factor (GAF) by providing a linear sliding scale adjustment for issuers whose failure rates are near the point at which the payment cliff occurs. To implement this policy, we needed to select the thresholds of the range (*innerZ<sub>i</sub>* and *outerZ<sub>i</sub>*) to calculate and apply the sliding scale adjustment.<sup>57</sup> In the proposed rule, we proposed to calculate and apply a sliding scale adjustment between the 90 and 99.7 percent confidence interval bounds (from +/– 1.645 to 3 standard deviations). Under this proposal, the determination of outliers in HHS–RADV for each HCC grouping would no longer be based on a 95 percent confidence interval or 1.96 standard deviations from the mean, and would instead be based on a 90 percent confidence interval or 1.645 standard deviations from the mean. Specifically, this approach would adjust the upper and lower bounds of the confidence interval to be at 1.645 standard deviations from the mean, meaning that issuers with group failure rates outside of the 90 percent confidence interval in any HCC failure rate group will have their risk scores adjusted. This would result in more issuers being considered outliers under this methodology than under the current methodology, which uses a 95 percent confidence interval to detect outlier issuers, but these additional outlier issuers would face smaller GAFs due to the application of the sliding scale.

To calculate the sliding scale adjustment, we proposed to add an additional step to the calculation of issuers’ GAFs that takes into consideration the distance of their group failure rates (GFRs) to the confidence interval. The present formula for an issuer’s GAF,  $GAF_{G,i} = GFR_{G,i} - \mu\{GFR_G\}$  would be modified by replacing the  $GFR_{G,i}$  with a decomposition of this value that uses the national weighted mean and national weighted standard deviation for the HCC failure rate group, as well as  $z_{G,i}$ , the z-score associated with the  $GFR_{G,i}$ , where:

<sup>57</sup> In the 2019 RADV White Paper, we considered four different options for calculating and applying additional thresholds for the sliding scale adjustment to the error rate calculation. See section 4.4.4 and 4.4.5 of the 2019 RADV White Paper.

$$z_{G,i} = \frac{GFR_{G,i} - \mu\{GFR_G\}}{Sd\{GFR_G\}}$$

And therefore:

$$GFR_{G,i} = z_{G,i} * Sd\{GFR_G\} + \mu\{GFR_G\}$$

So:

$$GAF_{G,i} = [z_{G,i} * Sd\{GFR_G\} + \mu\{GFR_G\}] - \mu\{GFR_G\}$$

The z-score would then be discounted using the general formula: where  $disZ_{G,i,r} = a * z_{G,i} + b_r$ , where  $disZ_{G,i,r}$  is the confidence-level discounted z-score for that value of  $z_{G,i}$  according to the

parameters of the positive or negative sliding scale range (from  $+/-1.645$  to 3 standard deviations). This  $disZ_{G,i,r}$  value will replace the  $z_{G,i}$  value in the  $GAF_{G,i}$  formula to provide the value of the

sliding scale adjustment for the positive or negative side of the confidence interval:

$$GAF_{G,i,r} = [disZ_{G,i,r} * Sd\{GFR_G\} + \mu\{GFR_G\}] - \mu\{GFR_G\}$$

In the calculation of  $disZ_{G,i,r}$ , the coefficient  $a$  would be the slope of the linear adjustment, which shows the adjustment increase rate per unit

increase of  $GFR_{G,i}$ , and  $b_r$  is the intercept of the linear adjustment for either the negative or positive sliding scale range. The coefficients would be

determined between  $+/-1.645$  to 3 standard deviations. Specifically, coefficient  $a$  would be defined as:

$$a = \frac{outerZ_r}{outerZ_r - innerZ_r}$$

Where:

- $a$  is the slope of the sliding scale adjustment
- $r$  indicates whether the  $GAF$  is being calculated for a negative or positive outlier

- $outerZ_r$  is the greater magnitude z-score selected to define the edge of a given sliding scale range  $r$  (3.00 for positive outliers; and  $-3.00$  for negative outliers)
- $innerZ_r$  is the lower magnitude z-score selected to define the edge of a given sliding scale range  $r$  (1.645 for positive

outliers; and  $-1.645$  for negative outliers)

The value of intercept  $b_r$  would differ based on whether the sliding scale is calculated for a positive or negative outlier and would be defined as:

$$b_r = outerZ_r - a * (outerZ_r) = outerZ_r * (1 - a)$$

In the absence of the constraints on negative failure rates that is being finalized later in this final rule, the final

formula for the group adjustment when an outlier issuer is subject to the sliding

scale ( $GAF_{G,i,r}$  above) would be simplified to:

$$GAF_{G,i,r} = disZ_{G,i,r} * Sd\{GFR_G\}$$

This sliding scale  $GAF_{G,i,r}$  would be applied to the HCC coefficients in the applicable HCC failure rate group when calculating each enrollee with an HCC's risk score adjustment factor for an issuer that had a failure rate with a z score

within the range of values (from  $+/-1.645$  to 3 standard deviations) selected for the sliding scale adjustment ( $innerZ_r$  and  $outerZ_r$ ). All other enrollee adjustment factors would be calculated using the current formula for the

$GAF_{G,i,r}$ . Under this approach, the above formulas would be implemented as follows:

If  $\text{freqEDGE}_{G,i} \geq 30$ , then:

If  $z_{G,i} < -3.00$  or  $z_{G,i} > 3.00$

Then  $\text{Flag}_{G,i} = \text{"outlier"}$  and  $\text{GAF}_{G,i} = \text{GFR}_{G,i} - \mu\{\text{GFR}_G\}$

Or if  $-3 \leq z_{G,i} < -1.645$  or  $3 \geq z_{G,i} > 1.645$

Then  $\text{Flag}_{G,i} = \text{"outlier"}$  and  $\text{GAF}_{G,i} = \text{dis}Z_{G,i,r} * \text{Sd}\{\text{GFR}_G\}$

If  $\text{freqEDGE}_{G,i} < 30$  or if  $-1.645 \leq z_{G,i} \leq 1.645$ :

Then  $\text{Flag}_{G,i} = \text{"not outlier"}$  and  $\text{GAF}_{G,i} = 0$

Where  $\text{dis}Z_{G,i,r}$  is calculated using 3.00 (or  $-3.00$ , for negative outliers) as the value of  $\text{outer}Z_r$  and 1.645 (or  $-1.645$ , for negative outliers) as the value of  $\text{inner}Z_r$ .

We sought comment on this proposal, including the proposed calculation of the sliding scale adjustment and the thresholds used to calculate and apply it. We also considered retaining the 95 percent confidence interval (1.96 standard deviations) as an alternative way to smooth the payment cliff. However, as noted in the proposed rule, while we recognize this option would also mitigate the payment cliff, we were concerned it would weaken the HHS–RADV program by reducing its overall impact and the magnitude of HHS–RADV adjustments to risk scores of outlier issuers.<sup>58</sup>

After consideration of comments received, we are finalizing the proposed sliding scale adjustment to smooth the payment cliff effect for those issuers whose failure rates are near the point at which the payment cliff occurs. We will calculate and apply a sliding scale adjustment between the 90 and 99.7 percent confidence interval bounds (from  $\pm 1.645$  to 3 standard deviations) beginning with 2019 benefit year HHS–RADV. For outlier issuers with failure rates more than 3 standard deviations from the mean, the GAF will not be impacted by the sliding scale adjustment, but will instead continue to be calculated as the difference between the weighted mean group failure rate and the issuers' group failure rate.

**Comments:** Some commenters supported the proposal to apply the sliding scale adjustment between the 90–99.7 percent confidence interval. Several commenters supported the adoption of a sliding scale adjustment

but wanted to retain the current confidence intervals and start the adjustment at the 95 percent confidence interval. These commenters were concerned with the increased number of outliers under the proposed sliding scale adjustment, which would result in more risk adjustment transfers being impacted by HHS–RADV results, arguing this would reduce predictability and stability of HHS–RADV. Other commenters expressed concern about the identification of more outliers under the proposed sliding scale adjustment, arguing it would be more disruptive especially during COVID–19. Some commenters stated that they did not believe that identifying outliers at the proposed 90 percent confidence interval would more accurately capture issuers' actuarial risk and some thought the proposed 90 percent confidence interval could lead to an increase in "false positives" when identifying outliers. These commenters stated that the 95 percent confidence interval imposes a more robust confidence interval for identifying "true outliers."

Some commenters wanted HHS to calculate error rates based on the difference between the edge of the confidence intervals and the outlier issuer's failure rate (instead of the difference between the weighted group mean or a sliding scale adjustment and the outlier issuer's failure rate). However, these commenters also supported the adoption of a sliding scale adjustment starting at the 95 percent confidence intervals, if HHS were to finalize a sliding scale adjustment. One commenter wanted HHS to identify outliers and calculate their GAF based on state specific group means to address potential over and under adjustments of outlier issuers relative to their state-based competitors. One commenter supported the current

methodology without a sliding scale adjustment, noting that the payment cliff effect resulted from the policy of only adjusting for outliers and that any measures to address the payment cliff would dampen the impact of HHS–RADV. Other commenters stated that it is appropriate for issuers who fall outside of the 99.7 percent confidence interval (beyond 3 standard deviations) to be assessed a full penalty. Another commenter, that supported the adoption of a sliding scale adjustment, expressed concerns that even with the proposed adjustment there would still be a payment cliff effect for issuers with very similar error rates. This commenter also asked HHS to address this effect for the current benefit year and beyond, as well as prior years, of HHS–RADV.

**Response:** We are finalizing the sliding scale approach for calculating an outlier issuer's error rate using modified group adjustment factors for issuers' group failure rates between 1.645 to 3 standard deviations from the mean on both sides of the confidence interval as proposed. We will apply this adjustment to the error rate calculation beginning with the 2019 benefit year of HHS–RADV. We believe that using a linear sliding scale adjustment will provide a smoothing effect in the current error rate calculation for issuers with failure rates just outside of the confidence interval of an HCC group and will retain the current significant adjustment to the HCC group weighted mean for issuers beyond three standard deviations. This approach ensures that the mitigation of the payment cliff for those issuers close to the confidence intervals does not impact situations where outlier issuers' failure rates are not close to the confidence intervals and a larger adjustment is warranted.

We appreciate the comments supporting an alternative sliding scale

<sup>58</sup> See 85 FR at 33608.

adjustment that would begin at 1.96 standard deviations. As detailed in the proposed rule, we recognize this alternative adjustment would also address the payment cliff and would provide stability by maintaining the current thresholds used in the error rate calculation. However, these benefits are outweighed by the concerns that such an adjustment would weaken HHS–RADV by reducing its overall impact and the magnitude of HHS–RADV adjustments to outlier issuer's risk scores. As noted previously, the sliding scale adjustment that is finalized in this rule will mitigate the payment cliff effect while not impacting the error rate calculation for those outlier issuers who are not close the confidence intervals.

While we did not propose adjusting issuers' error rates to the state-specific means, we considered such an approach in response to comments. However, we do not believe that using state-specific means would address the payment cliff in the current error rate methodology. We also have concerns about using national metrics to determine outliers and then switching to state-specific means to calculate the GAFs. In addition, the adoption of a state-specific approach to calculate the GAF could create other issues, if states have small sample sizes (that is, a small number of issuers participated in HHS–RADV), this would create less confidence in the state mean metric being used to adjust issuers, and would introduce new complexities as each state would have a different calculation for the GAF. We therefore decline to adopt such an approach in this final rule. We also considered adjusting to the confidence intervals,<sup>59</sup> but we have concerns that this option minimizes the impact of HHS–RADV adjustments on risk scores and risk adjustment transfers—including those outlier issuers with high error rates who are furthest away from the confidence intervals.

While any outlier threshold by definition has the risk of flagging false positives, and that risk may be slightly greater at the 90 percent confidence interval, we believe that the 90 percent confidence interval will better encourage issuers to ensure accurate EDGE data reporting and the risk of flagging false positives is mitigated by the fact that the adjustments to these issuers will be small since they will be subject to the sliding scale adjustment. Furthermore, while we understand the concerns that use of the 90 percent confidence interval will increase the number of outliers, we have found that

the overall impact of the proposed approach on risk adjustment transfers is less than the current methodology despite the increased number of outliers. As discussed in the 2019 RADV White Paper, we tested various potential sliding scale adjustments between the 90 and 99.7 percent confidence interval bounds using 2017 HHS–RADV results.<sup>60</sup> We found that even though including issuers whose failure rates fell between 1.645 and 1.96 standard deviations from the mean would increase the number of outliers, the sliding scale adjustment lowers the overall impact of HHS–RADV adjustments to transfers and results in the distribution of issuers' error rates moving closer to zero compared to the current methodology.<sup>61</sup> We also tested this policy on the 2018 benefit year HHS–RADV data once it became available and found similar results. We found that the sliding scale adjustment option between 1.645 and 1.96 standard deviations generally resulted in lower overall impact of HHS–RADV adjustment to risk adjustment transfers and the distribution of issuers' error rates moving closer to zero compared to the current methodology. Furthermore, we believe that the 90 percent confidence interval will maintain the program integrity impact of HHS–RADV despite the estimated reduced impact of HHS–RADV on risk adjustment transfers using the 90 percent confidence interval, and we are not concerned that increasing the number of outliers will be more disruptive during the COVID–19 public health emergency. More importantly, we believe that using the 90 percent confidence interval will preserve a strong incentive for issuers to submit accurate EDGE data that can be validated in HHS–RADV because it increases the range in which issuers can be flagged as outliers, while lowering the magnitude of that adjustment amount for those outlier issuers close to the confidence intervals and maintaining a larger adjustment for those who are not close to the confidence intervals. For these reasons, we believe that this methodology for calculating and applying the sliding scale adjustment provides a balanced approach to mitigating the payment cliff effect in the current methodology and disagree that adoption of the adjustment would reduce predictability and stability of HHS–RADV.

We recognize the sliding scale adjustment finalized in this rule does not eliminate the payment cliff because

the identification of outliers will still be based on the establishment and use of thresholds. As noted earlier, we are finalizing the targeted policies in this rule, such as the sliding scale adjustment, as incremental refinements to the current error rate methodology to address stakeholder feedback and our experience from the first payment year of HHS–RADV on these issues. We will continue to consider other potential changes to the error rate methodology for future benefit years, including potential significant changes to the outlier determination process, and as part of that process, we will also consider whether additional measures are necessary or appropriate to further mitigate the impact of the payment cliff after we have experience with the sliding scale adjustment finalized in this rule.

We will apply the sliding scale adjustment beginning with the 2019 benefit year of HHS–RADV, as proposed. We believe that application of this rule to the 2017 and 2018 HHS–RADV would not be appropriate because the error rate calculations for those benefit years are complete.<sup>62</sup> Further, it would disrupt issuers' well-settled expectations with respect to the calculation of HHS–RADV error rates and adjustments if we were to extend this new policy to the 2017 and 2018 benefit years. In addition, there is no need to apply the sliding scale adjustment to the earlier benefit years because HHS–RADV was not conducted for the 2014 benefit year and HHS–RADV was treated as a pilot for the 2015 and 2016 benefit years.<sup>63</sup>

*Comments:* A few commenters noted that the increase in the number of issuers identified as outliers due to the introduction of the sliding scale adjustment could increase volatility by increasing the likelihood that an issuer would be an outlier in three HCC failure rate groups, leading to larger overall error rates despite the smaller GAF in each group, or by creating several negative outliers in one state market risk pool. One commenter, who was concerned about the increased number of outliers, noted that issuers can have a larger HHS–RADV adjustment under the proposed sliding scale adjustment than under the current methodology.

<sup>62</sup> See, *supra*, notes 30 and 31.

<sup>63</sup> See FAQ ID 11290a (March 7, 2016) available at: [https://www.regap.info/faq\\_viewu.php?id=11290](https://www.regap.info/faq_viewu.php?id=11290) and HHS-Operated Risk Adjustment Data Validation (HHS–RADV)—2016 Benefit Year Implementation and Enforcement (May 3, 2017) available at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/HHS-Operated-Risk-Adjustment-Data-Validation-HHS-RADV-%E2%80%932016-Benefit-Year-Implementation-and-Enforcement.pdf>.

<sup>59</sup> See section 4.4.2 of the 2019 RADV White Paper.

<sup>60</sup> See section 4.4.5 and Appendix C of the 2019 RADV White Paper.

<sup>61</sup> *Ibid.*

Some commenters were concerned that this volatility from the increased number and type of outliers could increase premiums or adversely affect issuers' financial planning.

*Response:* We recognize that the sliding scale adjustment finalized in this rule will result in more issuers being identified as outliers than the current methodology.<sup>64</sup> However, when testing various potential sliding scale adjustment options, we found that even though including issuers whose failure rates fell between 1.645 and 1.96 standard deviations from the mean would increase the number of outliers, the sliding scale adjustment we are finalizing in this rule lowers the overall impact of HHS–RADV adjustments to risk adjustment transfers and results in the distribution of issuers' error rates moving closer to zero compared to the current methodology.<sup>65</sup> Therefore, we do not believe that using the sliding scale adjustment starting with the 1.645 confidence interval will increase volatility or impact premiums more than the previous methodology. Instead, we believe that the sliding scale adjustment finalized in this rule will preserve a strong incentive for issuers to submit accurate EDGE data that can be validated in HHS–RADV because it increases the range in which issuers can be flagged as outliers, while lowering the calculation of that adjustment amount for those outlier issuers close to the confidence intervals and maintaining a larger adjustment for those who are not close to the confidence intervals. For these reasons, we believe that the incorporation of the sliding scale adjustment as proposed provides a balanced approach to mitigating the payment cliff effect.

Under the new confidence intervals with the sliding scale adjustment beginning at 90 percent finalized in this rule, it is possible for an issuer to fail more HCC groups resulting in larger error rates than the previous methodology or for there to be more negative error rate outliers in a state market risk pool compared to the current methodology. In those cases, outlier issuers could have a higher error rate, or non-outlier issuers could be impacted by more outliers in their state market risk pool than under the current methodology that does not include a sliding scale adjustment. However, failure rates for the issuers newly identified as outliers due to the adoption of the sliding scale adjustment would be between 1.645 to 1.96

standard deviations. Since these issuers' failure rates are closer to the mean, the increase in error rates based on outlier status in several HCC failure rate groups would likely be small and could potentially be offset by reduced transfers from other issuers with failure rates between 1.96 and 3 standard deviations in the same state market risk pool.

*Comments:* Some commenters expressed concern that issues other than actual HCC validation errors that impact the measurement of actuarial risk, such as medical record retrieval issues or incorrect provider coding, may contribute to the variance in failure rates, and that it is therefore not appropriate to adjust outlier issuers to the mean. Other commenters noted that changing the confidence intervals does not ensure that validation of HCCs that contribute to actuarial risk is accurately measured through HHS–RADV; these commenters supported maintaining the current confidence intervals.

*Response:* HHS–RADV validates risk based upon the enrollee's medical record which generally aligns with how the Medicare Advantage risk adjustment data validation (MA–RADV) program operates. Specifically, § 153.630(b)(7)(ii) requires that the validation of enrollee health status (that is, the medical diagnoses) occur through medical record review, that the validation of medical records include a check that the records originate from the provider of the medical services, that they align with the dates of service for the medical diagnosis, and that they reflect permitted providers and services. When an issuer fails to submit a medical record or has submitted an inaccurate medical record, the issuer has failed to validate the issuer's risk under our regulations. We do not treat these medical record issues differently than other errors that can occur in HHS–RADV nor would we treat them differently for purposes of calculating GAF using the weighted group mean.

While we are amending the calculation of the GAF, we did not propose and are not finalizing any changes to no longer use the mean in the calculation of the GAF. The purpose of the sliding scale adjustment is to mitigate the payment cliff effect that was occurring by adjusting outlier issuers just outside the confidence interval to the weighted group mean. To ensure that the validation of HCCs that contribute to actuarial risk is accurately measured through HHS–RADV, we proposed the HCC failure rate grouping policy being finalized in this rule. That policy is another targeted refinement to the current methodology and it is

focused on ensuring that miscoding of HCCs in the same coefficient estimation group with the same risk scores does not contribute to an issuer's group failure rate. Additionally, in this rule, we are finalizing the application of HHS–RADV results to the benefit year being audited in response to stakeholder concerns about changes in population and risk score between benefit years.

*Comments:* A commenter requested that HHS release prior HHS–RADV results and data if the sliding scale adjustment policy is finalized.

*Response:* Summary information on issuers' 2017 and 2018 benefit years HHS–RADV results are available on the Premium Stabilization Program page of the CCIIO website, which can be accessed at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs>. Issuers who participated in HHS–RADV for these benefit years also received issuer-specific and enrollee-specific results in the Audit Tool at the same time the summary information was released. Additionally, HHS conducted two pilot years of HHS–RADV for the 2015 and 2016 benefit years to give HHS and issuers experience with how the audits would be conducted prior to applying HHS–RADV results to adjust issuers' risk scores and risk adjustment transfers in the applicable state market risk pool and for the 2016 benefit year, participating issuers were provided illustrative 2016 benefit year HHS–RADV results based on the application of the current error rate methodology. As noted previously, HHS–RADV was not conducted for the 2014 benefit year so there were no results to release or otherwise share. We also point this commenter to the analysis in the proposed rule,<sup>66</sup> as well as the results of the evaluation of the sliding scale adjustment options in the 2019 RADV White Paper, using 2017 benefit year HHS–RADV results.<sup>67</sup> In addition, Tables 3 and 4 in this rule share an analysis and comparison of the estimated changes reflecting implementation of this policy using both 2017 and 2018 benefit year HHS–RADV results.

### 3. Negative Error Rate Issuers With Negative Failure Rates

HHS–RADV uses a two-sided outlier identification approach because the long-standing intent has been to account for identified material risk differences between what issuers submitted to their EDGE servers and what was validated in

<sup>64</sup> See, e.g., 85 FR at 33608.

<sup>65</sup> See section 4.4.5 and Appendix C of the 2019 RADV White Paper.

<sup>66</sup> See 85 FR at 33613.

<sup>67</sup> See section 4.4.5 and Appendix C of the 2019 RADV White Paper.

medical records through HHS–RADV, regardless of the direction of those differences.<sup>68</sup> In addition, the two-sided adjustment policy penalizes issuers who validate HCCs in HHS–RADV at much lower rates than the national average and rewards issuers in HHS–RADV who validate HCCs in HHS–RADV at rates that are much higher than the national average, encouraging issuers to ensure that their EDGE-reported risk scores reflect the true actuarial risk of their enrollees. Positive and negative error rate outliers represent these two types of adjustments, respectively.

If an issuer is a positive error rate outlier, its risk score will be adjusted downward. Assuming no changes to risk scores for the other issuers in the same state market risk pool, this downward adjustment increases the issuer's charge or decreases its payment for the applicable benefit year, leading to a decrease in charges or an increase in payments for the other issuers in the state market risk pool. If an issuer is a negative error rate outlier, its risk score will be adjusted upward. Assuming no changes to risk scores for the other issuers in the same state market risk

pool, this upward adjustment reduces the issuer's charge or increases its payment for the applicable benefit year, leading to an increase in charges or a decrease in payments for the other issuers in the state market risk pool. The increase to risk score(s) for negative error rate outliers is consistent with the upward and downward risk score adjustments finalized as part of the original HHS–RADV methodology in the 2015 Payment Notice<sup>69</sup> and the HCC failure rate approach to error estimation finalized in the 2019 Payment Notice.<sup>70</sup>

In response to stakeholder feedback about the impact of negative error rate issuer HHS–RADV adjustments on issuers who are not outliers, we proposed to adopt a constraint to the calculation of negative error rate outlier issuers' error rates in cases when an outlier issuer's failure rate is negative. An issuer can be identified as a negative error rate outlier for a number of reasons. However, the current error rate methodology does not distinguish between low failure rates due to accurate data submission and failure rates that have been depressed through the presence of found HCCs (that is,

HCCs in the audit data that were not present in the EDGE data). If a negative failure rate is due to a large number of found HCCs, it does not reflect accurate reporting through the EDGE server for risk adjustment. For this reason, we proposed to refine the error rate calculation to mitigate the impact of adjustments that result from negative error rate outliers that are driven by newly found HCCs rather than by high validation rates.

Beginning with 2019 benefit year HHS–RADV, we proposed to adopt an approach that constrains negative error rate outlier issuers' error rate calculations in cases when an issuer's failure rate is negative. For negative error rate outlier issuers with negative failure rates, the proposed constraint would be applied to the GAF such that this value would be calculated as the difference between the weighted mean failure rate for the HCC grouping (if positive) and zero (0). This would be calculated by substituting the following  $||\text{double barred}||$  terms and definitions into the error rate calculation<sup>71</sup> process:

If  $\text{freqEDGE}_{G,i} \geq 30$ , then:

If  $\text{GFR}_{G,i} > \text{UB}_G$  or  $\text{GFR}_{G,i} < \text{LB}_G$ :

Then  $\text{Flag}_{G,i} = \text{"outlier"}$  and  $\text{GAF}_{G,i} = ||\text{GFR}_{G,i,\text{constr}} - \mu\{\text{GFR}_G\}_{\text{constr}}||$

If  $\text{freqEDGE}_{G,i} < 30$  or if  $\text{GFR}_{G,i} \leq \text{UB}_G$  and  $\text{GFR}_{G,i} \geq \text{LB}_G$ :

Then  $\text{Flag}_{G,i} = \text{"not outlier"}$  and  $\text{GAF}_{G,i} = 0$

<sup>68</sup> An exception to this approach was established, beginning with the 2018 benefit year of HHS–RADV, for exiting issuers who are negative error rate outliers. See 84 FR at 17503–17504.

<sup>69</sup> For example, we stated that “the effect of an issuer's risk score error adjustment will depend upon its magnitude and direction compared to the average risk score error adjustment and direction for the entire market.” See 79 FR 13743 at 13769.

<sup>70</sup> See 83 FR 16930 at 16962. The shorthand “positive error rate outlier” captures those issuers whose HCC coefficients are reduced as a result of being identified as an outlier, while “negative error rate outlier” captures those issuers whose HCC coefficients are increased as a result of being identified as an outlier.

<sup>71</sup> This calculation sequence is expressed here in a revised order compared to how the sequence is

published in the 2021 Payment Notice (85 FR at 29196–29198). This change was made to simplify the illustration of how this sequence will be combined with proposals finalized in this rule. The different display does not modify or otherwise change the amendments to the outlier identification process finalized in the 2021 Payment Notice.



Where:

$GFR_{G,i}$  is an issuer's failure rate for the HCC failure rate grouping

$\|GFR_{G,i,constr}$  is an issuer's failure rate for the HCC failure rate grouping, constrained to 0 if it is less than 0. Also expressed as:

$$GFR_{G,i,constr} = \max\{0, GFR_{G,i}\|$$

$\mu\{GFR_G\}$  is the weighted national mean failure rate for the HCC failure rate grouping

$\|\mu\{GFR_G\}_{constr}$  is the weighted national mean failure rate for the HCC failure rate

grouping, constrained to 0 if  $\mu\{GFR_G\}$  is less than 0. Also expressed as:

$$\mu\{GFR_G\}_{constr} = \max\{0, \mu\{GFR_G\}\|$$

$UB_G$  and  $LB_G$  are the upper and lower bounds of the HCC failure rate grouping confidence interval, respectively.

$Flag_{G,i}$  is the indicator if issuer  $i$ 's group failure rate for group  $G$  locates beyond a calculated threshold that we are using to classify issuers into "outliers" or "not outliers" for group  $G$ .

$GAF_{G,i}$  is the group adjustment factor for HCC failure rate group  $G$  for an issuer  $i$ .

We would then compute total adjustments and error rates for each outlier issuer based on the weighted aggregates of the  $GAF_{G,i}$ .<sup>72</sup>

We are finalizing this refinement to the error rate calculation as proposed. We will adjust the GAF calculation to be the difference between the weighted group mean and zero for negative error rate issuers with negative failure rates beginning with the 2019 benefit year of HHS–RADV.

**Comments:** Most commenters supported the proposed negative failure rate constraint. These commenters tended to be concerned that the current methodology rewards issuers who fail to submit accurate data to the EDGE server, were concerned about predictability of HHS–RADV adjustments, or thought that the proposed constraint would result in more equitable HHS–RADV adjustments. A few commenters opposed the proposed negative failure rate constraint. These commenters, as well as another commenter that was not opposed to the negative failure rate constraint, expressed concerns that the proposed negative failure rate constraint would treat issuers with different validation rates and the same rate of found HCCs the same for calculating error rates, potentially penalizing issuers that submitted more verifiable HCCs. Some commenters argued that

the potential for underreporting of risk in risk adjustment was minor, and one supported allowing issuers to get credit for the risk that they incurred including through newly found HCCs.

Other commenters generally agreed that a change in methodology is needed to reduce the magnitude of HHS–RADV adjustments due to negative error rate issuers and the impact of these adjustments on non-outlier issuers in the same state market risk pool. Some commenters wanted HHS to abandon the two-sided nature of the outlier identification process and not adjust for any negative error rate outliers or urged HHS to look for ways to minimize adverse impact of negative error rate outliers on non-outliers. Other commenters recommended that HHS analyze the failure rates for negative error rate outliers without including found HCCs (meaning that only non-validated EDGE HCCs would be contributing to the issuer's failure rate) and compare the results with the current methodology to assess if negative error rate outliers had better validation rates. Another commenter requested that HHS monitor data on the policy's impact, if finalized.

**Response:** We are finalizing the proposed approach to constrain negative error rate outlier issuers' error rate calculations in cases when an outlier issuer's failure rate is negative and will apply this constraint beginning with the 2019 benefit year of HHS–RADV. We believe that the negative failure rate constraint to the GAF calculation in the error rate calculation will reduce potential incentives for issuers to use HHS–RADV to identify more HCCs than were reported to their EDGE servers and provide additional incentives for issuers to submit the most accurate data to the EDGE server. It also will mitigate the impact of HHS–RADV adjustments to transfers in the case of negative error

rate issuers with negative failure rates and improve predictability. Specifically, this approach would limit the financial impact that negative error rate outliers with negative failure rates will have on other issuers in the same state market risk pool and can be easily implemented under the current error rate methodology.

We understand that this constraint has limitations. We used 2017 and 2018 benefit year HHS–RADV results to analyze the failure rates of negative error rate outliers and explore the impact of excluding found HCCs. We found that negative error rate outliers tended to have better than average validation rates, particularly when the HCC grouping methodology finalized in this rule is applied and those issues get credit for IVA findings that substitute for EDGE HCCs in the same HCC coefficient estimation group. However, at the same time, we recognize that there are limitations to the negative failure rate constraint policy as it does not distinguish between issuers with different validation rates and the same rate of found HCCs. Thus, as previously noted, this policy and the other changes to the error rate calculation in this rule are targeted refinements to the current methodology as we consider other potential long-term approaches. In proposing and finalizing these changes, we sought to balance the goals of promoting stability and predictability of HHS–RADV adjustments and adopting refinements as expeditiously as possible. The negative error rate constraint was designed with these goals in mind, as it builds on the current methodology, which issuers now have several years of experience with, and is easy to implement. It is an interim measure that will limit the financial impact that negative error rate outliers with negative failure rates have on other issuers in the same state market risk

<sup>72</sup> See, for example, the 2018 Benefit Year Protocols: PPACA HHS Risk Adjustment Data Validation, Version 7.0 (June 24, 2019), available at: [https://www.regtap.info/uploads/library/HRADV\\_2018Protocols\\_070319\\_RETIREDD\\_5CR\\_070519.pdf](https://www.regtap.info/uploads/library/HRADV_2018Protocols_070319_RETIREDD_5CR_070519.pdf).

pool. We remain committed to continuing to explore different longer-term options, including approaches that involve significant methodological changes, such as those described in the 2019 RADV White Paper that would switch to identifying outliers based on risk score instead of number of HCCs.<sup>73</sup>

We also decline to abandon the two-sided nature of the outlier identification process. The long-standing intent of HHS–RADV has been to account for identified material risk differences between what issuers submitted to their EDGE servers and what was validated in medical records through HHS–RADV, regardless of the direction of those differences. The increase to risk scores for negative error rate outliers is consistent with the upward and downward risk score adjustments finalized as part of the original HHS–RADV methodology in the 2015 Payment Notice<sup>74</sup> and the HCC failure rate approach to error estimation finalized in the 2019 Payment Notice.<sup>75</sup> The two-sided approach also encourages issuers to ensure that their EDGE-reported risk scores reflect the true actuarial risk of their enrollees.

We agree with the commenter that supported allowing issuers to get credit for the risk that they incurred including through newly found HCCs. It ensures that risk adjustment transfers are made based on documented risk and that, consistent with the statute, the HHS-operated program assesses charges to plans with lower-than-average actuarial risk while making payments to plans with higher-than-average actuarial risk. As such, even with the adoption of this constraint, the calculation of error rates will still include found HCCs. The negative failure rate constrained value in the calculation of the GAF will only impact the negative failure rate portion of an issuer's GAF. Therefore, this policy ensures that negative error rate outlier issuers with negative failure rates will only get credit in their error rate calculation for finding HCCs at a similar rate as they reported to EDGE and will not get credit for finding more HCCs in HHS–RADV than they reported on EDGE. We believe that any issuer with a negative failure rate is likely to review their internal processes to better capture missing HCCs in future EDGE

data submissions. We intend to monitor the impact of this policy on future benefit years of HHS–RADV data.

*Comments:* One commenter noted that it is not evident that issuers with negative failure rates in one HCC group are adding more diagnoses given that the three HCC grouping structure allows for HCCs to be found in one grouping and missing in another grouping. One commenter noted that the proposal to calculate the GAF between zero and the weighted mean for negative failure rate issuers does not reflect the outlier portion of the negative error rate outlier (because the adjustment is within the confidence intervals for two of three HCC groupings). Another commenter expressed concerns that the national mean is not adjusted for found HCCs under the proposal leading to concerns that the national mean is being inflated and proposed adjusting negative error rate outliers to the edge of the confidence intervals as an alternative to the proposed negative failure rate constraint.

*Response:* The purpose of this negative failure rate constraint policy is to mitigate the impact of HHS–RADV adjustments due to negative error rate issuers with negative failure rates. We understand that the HCC failure rate grouping methodology can result in an issuer finding HCCs in one HCC failure rate group when the HCC may be missing in another HCC failure rate grouping. We are finalizing the HCC grouping refinement discussed earlier in this rule to help prevent those cases from occurring when the HCCs are in the same HCC coefficient estimation group in the adult risk adjustment models. We also acknowledge that this constraint would not affect the calculation of the national mean, which would continue to consider all found HCCs and that the calculation of the GAF under this constraint policy may not fully reflect the outlier portion. We considered these limitations and weighted them against the benefits of this policy. While we do have concerns about the impact of adjustments resulting from negative error rate issuers with negative failure rates, we believe that issuers should retain the ability to find HCCs in HHS–RADV. Having the ability to find HCCs in HHS–RADV is important to ensure that issuers' actual actuarial risk is reflected in HHS–RADV, especially when those HCCs replace related HCCs that were reported to EDGE. As such, we believe that found HCCs should continue to contribute to the national mean. At the same time, given the number of negative error rate issuers with negative failure rates, we believe that it is important to refine the

current methodology to reduce the incentives for issuers to find HCCs in HHS–RADV that are not reported in EDGE. We intend to monitor the impact of this policy on HHS–RADV adjustments and will continue to explore potential further refinements and changes to the HHS–RADV methodology and program requirements for future benefit years.

*Comment:* Some commenters stated that the HHS–RADV Protocols and the applicable EDGE data submission requirements did not align and recommended that HHS align these documents. One of these commenters recommended aligning these rules as an alternative to constraining negative error rate outliers with negative failure rates.

*Response:* We did not propose and are not finalizing any changes to the EDGE data submission requirements. As noted earlier, the long-standing intent of HHS–RADV has been to account for identified material risk differences between what issuers submitted to their EDGE servers and what was validated in medical records through HHS–RADV, regardless of the direction of those differences. This includes allowing issuers to get credit for the risk that they incurred including through newly found HCCs. However, in response to stakeholder feedback, we are adopting the negative failure rate constraint to limit the impact of HHS–RADV adjustments due to negative error rate issuers with negative failure rates beginning with the 2019 benefit year of HHS–RADV. We disagree that the HHS–RADV Protocols and the EDGE data submission are not appropriately aligned as the EDGE data submissions and HHS–RADV Protocols are different processes. Specifically, the EDGE data submission process for risk adjustment requires issuers to submit all paid claims to their respective EDGE servers, regardless of provider type, for the applicable benefit year. These paid claims provide the diagnoses that are used to calculate risk adjustment transfers at the state market risk pool level under the state payment transfer formula.<sup>76</sup> HHS–RADV is a review of an enrollee's medical records to confirm the diagnoses used to perform the

<sup>73</sup> See Section 3.3 on addressing the influence of HCC hierarchies on failure rate outlier determination (Pages 63–71). <https://www.cms.gov/files/document/2019-hhs-risk-adjustment-data-validation-hhs-radv-white-paper.pdf>.

<sup>74</sup> For example, we stated that “the effect of an issuer's risk score error adjustment will depend upon its magnitude and direction compared to the average risk score error adjustment and direction for the entire market.” See 79 FR 13743 at 13769.

<sup>75</sup> See 83 FR 16930 at 16962.

<sup>76</sup> For the 2014 through 2016 benefit years, EDGE data was also used for the transitional reinsurance program established under section 1341 of the PPACA. The reinsurance program provided reimbursement based on the total amount of claims paid. Beginning with the 2018 benefit year, EDGE data is also used for calculating payments under the high-cost risk pool (HCRP) parameters added to the HHS risk adjustment methodology. Similar to the reinsurance program, HCRP payments are based on the amount of paid claims. Therefore, information on all claims paid—from all provider types—for a given benefit year should be submitted by issuers to their EDGE servers.

calculations under the state payment transfer formula. HHS-RADV allows issuers to take into account an issuer's paid claims for the applicable benefit year for medical record review and this process also allows issuers to take into account certain diagnoses found during the review of the medical records of the enrollee to provide a more complete and accurate picture of an enrollee's risk to the issuer. Further, while HHS-RADV Protocols allow IVA and SVA auditors to abstract documented "Lifelong Permanent Conditions" <sup>77</sup> that may not be captured in EDGE data submissions, we disagree that such an approach is inappropriate. The list of Lifelong Permanent Conditions is a set of health conditions that require ongoing medical attention and where all associated diagnoses are typically unresolved once diagnosed. Allowing abstraction of diagnosis codes for those conditions from medical records submitted during HHS-RADV if the Lifelong Permanent Condition is identified in the enrollee's medical history included in a medical record for the applicable benefit year ensures that an enrollee's full health risk is captured and reflected in risk adjustment transfers for that state market risk pool.

#### a. Combining the HCC Grouping Constraint, Negative Failure Rate Constraint and the Sliding Scale Proposals

As discussed elsewhere in this final rule, we are finalizing as proposed each of the three constituent proposals to refine the current error rate calculation. To illustrate the interaction of the finalized policies to create Super HCCs for HHS-RADV grouping purposes, apply the sliding scale adjustment, and constrain negative failure rates for negative error rate outliers, this section

outlines the complete finalized revised error rate calculation methodology formulas that will apply beginning with the 2019 benefit year of HHS-RADV, integrating all the changes finalized in this rule. <sup>78</sup>

First, HHS will use the failure rates for Super HCCs to group each HCC into three HCC groupings (a high, medium, or low HCC failure rate grouping). Under the finalized approach, Super HCCs will be defined as HCCs that have been aggregated such that HCCs that are in the same HCC coefficient estimation group in the adult models are aggregated together and all other HCCs each compose a Super HCC individually. Using the Super HCCs, we will calculate the HCC failure rate as follows:

$$FR_c = 1 - \frac{freqIVA_c}{freqEDGE_c}$$

Where:

$c$  is the index of the  $c$ th Super HCC;  
 $freqEDGE_c$  is the frequency of a Super HCC  $c$  occurring in EDGE data; that is, the sum of  $freqEDGE_h$  for all HCCs that share an HCC coefficient estimation group in the adult risk adjustment models;

$$freqEDGE_c = \sum_h freqEDGE_{h,c}$$

When an HCC is not in an HCC coefficient estimation group in the adult risk adjustment models, the  $freqEDGE_c$  for that HCC will be equivalent to  $freqEDGE_h$ ;

$freqIVA_c$  is the frequency of a Super HCC  $c$  occurring in IVA results (or SVA results, as applicable); that is, the sum of  $freqIVA_h$  for all HCCs that share an HCC coefficient estimation group in the adult risk adjustment models:

$$freqIVA_c = \sum_h freqIVA_{h,c}$$

$$\mu\{GFR_G\} = 1 - \frac{\sum_i freqIVA_{G,i}}{\sum_i freqEDGE_{G,i}}$$

$$Sd\{GFR_G\} = \sqrt{\frac{\sum_i \left( freqEDGE_{G,i} * (GFR_{G,i} - \mu\{GFR_G\})^2 \right)}{\sum_i freqEDGE_{G,i}}}$$

And;

$FR_c$  is the national overall (average) failure rate of Super HCC  $c$  across all issuers.

Then, the failure rates for all Super HCCs, both those composed of a single HCC and those composed of the aggregate frequencies of HCCs that share an HCC coefficient estimation group in the adult models, will be grouped according to the current sorting algorithm in the current HHS-RADV failure rate grouping methodology. <sup>79</sup> These HCC groupings will be determined by first ranking all Super HCC failure rates and then dividing the rankings into the three groupings weighted by total observations of that Super HCC across all issuers' IVA samples, thereby assigning each Super HCC into a high, medium, or low HCC failure rate grouping. This process ensures that all HCCs in a Super HCC are grouped into the same HCC failure rate grouping in HHS-RADV.

Next, an issuer's HCC group failure rate would be calculated as follows:

$$GFR_{G,i} = 1 - \frac{freqIVA_{G,i}}{freqEDGE_{G,i}}$$

Where:

$freqEDGE_{G,i}$  is the number of occurrences of HCCs in group  $G$  that are recorded on EDGE for all enrollees sampled from issuer  $i$ .

$freqIVA_{G,i}$  is the number of occurrences of HCCs in group  $G$  that are identified by the IVA (or SVA, as applicable) for all enrollees sampled from issuer  $i$ .

$GFR_{G,i}$  is issuer  $i$ 's group failure rate for the HCC group  $G$ .

HHS calculates the weighted mean failure rate and the standard deviation of each HCC group as:

<sup>77</sup> See, for example, Appendix E of the 2018 Benefit Year HHS-RADV Protocols, which describes the guidelines for abstracting Lifelong Permanent Conditions from medical records for purposes of the 2018 benefit year of HHS-RADV.

<sup>78</sup> The illustration of the error rate calculation methodology formulas that will apply beginning with the 2019 benefit year of HHS-RADV also includes the policy finalized in the 2021 Payment Notice to not consider issuers with fewer than 30

HCCs in an HCC failure rate group to be outliers in that HCC failure rate group but continue to include such issuers in the calculation of national metrics. See 85 FR at 29196–29198.

<sup>79</sup> See Section 11.3.1 of the 2018 HHS-RADV Protocols at [https://www.regtap.info/uploads/library/HRADV\\_2018Protocols\\_070319\\_RETIREDCR\\_070519.pdf](https://www.regtap.info/uploads/library/HRADV_2018Protocols_070319_RETIREDCR_070519.pdf) for a description of the process prior to the introduction of Super HCCs. Beginning with the 2019 benefit year of HHS-RADV, Super

HCCs would take the place of HCCs in the process. The 2019 HHS-RADV Protocols have thus far only been published in part at [https://www.regtap.info/uploads/library/HRADV\\_2019\\_Protocols\\_111120\\_5CR\\_111120.pdf](https://www.regtap.info/uploads/library/HRADV_2019_Protocols_111120_5CR_111120.pdf). The section of the 2019 HHS-RADV Protocols pertaining to HCC grouping for failure rate calculations is not included in the current version. Once published, this section will be updated to include steps related to creation of Super HCCs.

Where:

$\mu\{GFR_G\}$  is the weighted mean of  $GFR_{G,i}$  of all issuers for the HCC group  $G$  weighted by all issuers' sample observations in each group.

$Sd\{GFR_G\}$  is the weighted standard deviation of  $GFR_{G,i}$  of all issuers for the HCC group  $G$ .

Each issuer's HCC group failure rates will then be compared to the national metrics for each HCC failure rate grouping. If an issuer's failure rate for an HCC failure rate group falls outside of the two-tailed 90 percent confidence interval with a 1.645 standard deviation cutoff based on the weighted mean failure rate for the HCC failure rate group, the failure rate for the issuer's

HCCs in that group will be considered an outlier (if the issuer meets the minimum number of HCCs for the HCC failure rate group). Based on issuers' failure rates for each HCC failure rate group, outlier status will be determined for each issuer independently for each issuer's HCC failure rate group such that an issuer may be considered an outlier in one HCC failure rate group but not an outlier in another HCC failure rate group. Beginning with the 2019 benefit year, issuers will not be considered an outlier for an HCC group in which the issuer has fewer than 30 EDGE HCCs. If no issuers' HCC group failure rates in a state market risk pool materially deviate from the national mean of failure rates

or if those issuers whose failure rates do materially deviate from the national mean do not also meet the minimum HCC frequency requirement (that is, if no issuers in the state market risk pool are outliers), HHS will not apply any HHS-RADV adjustments to issuers' risk scores or to transfers in that state market risk pool.

Then, once the outlier issuers are determined, we will calculate the GAF taking into consideration the outlier issuer's distance from the confidence interval and limiting calculation of the GAF when if the issuer is a negative error rate outlier with a negative failure rate. The formula<sup>80</sup> will apply as follows:

If  $freqEDGE_{G,i} \geq 30$ , then:

If  $z_{G,i} < -3.00$  or  $z_{G,i} > 3.00$

Then  $Flag_{G,i} = \text{"outlier"}$  and

$$GAF_{G,i} = \max\{0, GFR_{G,i}\} - \max\{0, \mu\{GFR_G\}\}$$

Or if  $-3 \leq z_{G,i} < -1.645$  or  $3 \geq z_{G,i} > 1.645$

Then  $Flag_{G,i} = \text{"outlier"}$  and

$$GAF_{G,i} = \max\{0, (disZ_{G,i,r} * Sd\{GFR_G\} + \mu\{GFR_G\})\} - \max\{0, \mu\{GFR_G\}\}$$

If  $freqEDGE_{G,i} < 30$  or if  $-1.645 \leq z_{G,i} \leq 1.645$

Then  $Flag_{G,i} = \text{"not outlier"}$  and  $GAF_{G,i} = 0$

Where:

- $r$  indicates whether the GAF is being calculated for a negative or positive outlier;

- $a$  is the slope of the sliding scale adjustment, calculated as:

$$a = \frac{outerZ_r}{outerZ_r - innerZ_r}$$

With  $outerZ_r$  defined as the greater magnitude z-score selected to define the edge of the sliding scale range  $r$  (3.00 for positive outliers; and  $-3.00$  for negative outliers) and  $innerZ_r$  defined as the

lower magnitude z-score selected to define the edge of the range  $r$  (1.645 for positive outliers; and  $-1.645$  for negative outliers);

- $b_r$  is the intercept of the sliding scale adjustment for a given sliding scale range  $r$ , calculated as:

$$b_r = outerZ_r - a * (outerZ_r) = outerZ_r * (1 - a)$$

<sup>80</sup> This calculation sequence is expressed here in a revised order compared to how the sequence is published in the 2021 Payment Notice (85 FR at

29196–29198). This change was made to simplify the illustration of how this sequence would be combined with proposals finalized in this rule. The

different display does not modify or otherwise change the amendments to the outlier identification process finalized in the 2021 Payment Notice.

•  $disZ_{G,i,r}$  is the z-score of issuer  $i$ 's  $GFR_{G,i}$ , for HCC failure rate group  $G$  discounted according to the sliding

scale adjustment for range  $r$ , calculated as:

$$disZ_{G,i,r} = a * z_{G,i} + b_r$$

With  $z_{G,i}$  defined as the z-score of  $i$  issuers'  $GFR_{G,i}$ :

$$z_{G,i} = \frac{GFR_{G,i} - \mu\{GFR_G\}}{Sd\{GFR_G\}}$$

•  $GAF_{G,i}$  is the group adjustment factor for HCC failure rate group  $G$  for an issuer  $i$ ;

•  $Sd\{GFR_G\}$  is the weighted national standard deviation of all issuers'  $GFRs$  for HCC failure rate group  $G$ ;

•  $\mu\{GFR_G\}$  is the weighted national mean of all issuers'  $GFRs$  for HCC failure rate group  $G$ .

Once an outlier issuer's GAF is calculated, the enrollee adjustment will be calculated by applying the GAF to an enrollee's individual EDGE HCCs. For example, if an issuer has an enrollee with the HIV/AIDS HCC and the issuer's HCC group adjustment rate is 10 percent for the HCC group that contains the HIV/AIDS HCC, the enrollee's HIV/AIDS coefficient would be reduced by

10 percent. This reduction would be aggregated with any reductions to other EDGE HCC risk score coefficients for that enrollee to arrive at the overall enrollee adjustment factor. This value would be calculated according to the following formula for each sample enrollee in strata 1 through 9 with EDGE HCCs:<sup>81</sup>

$$Adjustment_{i,e} = \frac{\sum_h (RS_{h,G,i,e} * GAF_{G,i})}{\sum_h (RS_{h,G,i,e})}$$

Where:

$RS_{h,G,i,e}$  is the risk score component of a single HCC  $h$  (belonging to HCC group  $G$ ) recorded on EDGE for enrollee  $e$  of issuer  $i$ .

$GAF_{G,i}$  is the group adjustment factor for HCC failure rate group  $G$  for an issuer  $i$ ;

$Adjustment_{i,e}$  is the calculated adjustment amount to adjust enrollee  $e$  of issuer  $i$ 's EDGE risk scores.

The calculation of the enrollee adjustment factor only considers risk score factors related to the HCCs and ignores any other risk score factors (such as demographic factors and RXC factors). Furthermore, because this formula is concerned exclusively with EDGE HCCs, HCCs newly identified by the IVA (or SVA as applicable) would

not contribute to enrollee risk score adjustments for that enrollee and adjusted enrollee risk scores are only computed for sampled enrollees with EDGE HCCs in strata 1 through 9.

Next, for each sampled enrollee with EDGE HCCs, HHS will calculate the total adjusted enrollee risk score as:

$$AdjRS_{i,e} = EdgeRS_{i,e} * (1 - Adjustment_{i,e})$$

Where:

$EdgeRS_{i,e}$  is the risk score as recorded on the EDGE server of enrollee  $e$  of issuer  $i$ .

$AdjRS_{i,e}$  is the amended risk score for sampled enrollee  $e$  of issuer  $i$ .

$Adjustment_{i,e}$  is the adjustment factor by which we estimate whether the EDGE risk score exceeds or falls short of the IVA or SVA projected total risk score for sampled enrollee  $e$  of issuer  $i$ .

The calculation of the sample enrollee's adjusted risk score includes

all EDGE server components for sample enrollees in strata 1 through 9 with EDGE HCCs.

After calculating the outlier issuers' sample enrollees with HCCs' adjusted EDGE risk scores, HHS will calculate an outlier issuer's error rate by extrapolating the difference between the amended risk score and EDGE risk score for all enrollees (strata 1 through 10) in the sample. The extrapolation formula will be weighted by determining the

ratio of an enrollee's stratum size in the issuer's population to the number of sample enrollees in the same stratum as the enrollee. Sample enrollees with no EDGE HCCs will be included in the extrapolation of the error rate for outlier issuers with the EDGE risk score unchanged for these sample enrollees. The formulas to compute the error rate using the stratum-weighted risk score before and after the adjustment will be:

<sup>81</sup> Some enrollees sampled in Strata 1–3 will only have RXCs, which are not considered as part of the determination of an enrollee adjustment factor.

$$ErrorRate_i = 1 - \frac{\sum_e(w_{i,e} * AdjRS_{i,e})}{\sum_e(w_{i,e} * EdgeRS_{i,e})}$$

Where:

$$w_{i,e} = \frac{\text{stratum size in population}}{\text{number of sample enrollees of the stratum}}$$

Consistent with 45 CFR 153.350(b), HHS then will apply the outlier issuer's error rate to adjust that issuer's applicable benefit year's plan liability risk score.<sup>82</sup> This risk score change, which also will impact the state market average risk score, will then be used to adjust the applicable benefit year's risk adjustment transfers for the applicable state market risk pool.<sup>83</sup> Due to the budget-neutral nature of the HHS-operated risk adjustment program, adjustments to one issuer's risk scores and risk adjustment transfers based on HHS-RADV findings affect other issuers in the state market risk pool (including those who were not identified as outliers) because the state market average risk score changes to reflect the outlier issuer's change in its plan

liability risk score. This also means that issuers that are exempt from HHS-RADV for a given benefit year will have their risk adjustment transfers adjusted based on other issuers' HHS-RADV results if any issuers in the applicable state market risk pool are identified as outliers.

In the proposed rule, we estimated the combined impact of applying the proposed sliding scale adjustment, the proposed negative failure rate constraint and the proposed Super HCC aggregation using 2017 benefit year HHS-RADV results. We performed a similar analysis using 2018 benefit year HHS-RADV results, once the data became available. Table 3 provides a comparison of the national failure rate metrics under the current and new,

finalized methodologies using 2017 and 2018 benefit year HHS-RADV results. Additionally, using the 2017 and 2018 HHS-RADV data, Table 4 provides a comparison between the estimated mean error rates using the current methodology for sorting HCCs for HHS-RADV grouping or the finalized Super HCC aggregation for sorting of HCCs for HHS-RADV groupings, with the finalized negative failure rate constraint and the finalized sliding scale adjustment also being applied. As shown in Tables 3 and 4, the analysis of 2018 HHS-RADV results provided roughly the same figures as the 2017 HHS-RADV results, and offers further support for finalizing these refinements to the error rate calculation.

TABLE 3—A COMPARISON OF HHS-RADV NATIONAL FAILURE RATE METRICS BASED ON PRIOR BENEFIT YEAR HHS-RADV DATA

| HHS-RADV data benefit year | Group      | Weighted mean failure rate |              | Weighted std. dev. |              | Lower threshold             |                         | Upper threshold             |                         |
|----------------------------|------------|----------------------------|--------------|--------------------|--------------|-----------------------------|-------------------------|-----------------------------|-------------------------|
|                            |            | Current grouping           | New grouping | Current grouping   | New grouping | Current grouping and 95% CI | New grouping and 90% CI | Current grouping and 95% CI | New grouping and 90% CI |
| 2017 Data .....            | Low .....  | 0.0476                     | 0.0496       | 0.0973             | 0.0959       | −0.1431                     | −0.1082                 | 0.2382                      | 0.2074                  |
|                            | Med .....  | 0.1549                     | 0.1557       | 0.0992             | 0.0994       | −0.0395                     | −0.0078                 | 0.3493                      | 0.3192                  |
|                            | High ..... | 0.2621                     | 0.2595       | 0.1064             | 0.1065       | 0.0536                      | 0.0843                  | 0.4706                      | 0.4347                  |
| 2018 Data .....            | Low .....  | 0.0337                     | 0.0369       | 0.0884             | 0.0856       | −0.1396                     | −0.1038                 | 0.2070                      | 0.1777                  |
|                            | Med .....  | 0.1198                     | 0.1225       | 0.0862             | 0.0856       | −0.0490                     | −0.0184                 | 0.2887                      | 0.2633                  |
|                            | High ..... | 0.2262                     | 0.2283       | 0.0919             | 0.0914       | 0.0461                      | 0.0779                  | 0.4062                      | 0.3787                  |

TABLE 4—A COMPARISON OF HHS-RADV ERROR RATE (ER) ESTIMATED CHANGES BASED ON PRIOR BENEFIT YEAR<sup>84</sup> HHS-RADV DATA

| Scenario                                                              | 2017 Data              |                  |                    |                  | 2018 Data              |                  |                    |                  |
|-----------------------------------------------------------------------|------------------------|------------------|--------------------|------------------|------------------------|------------------|--------------------|------------------|
|                                                                       | Current sorting method |                  | New sorting method |                  | Current sorting method |                  | New sorting method |                  |
|                                                                       | Mean neg. ER (%)       | Mean pos. ER (%) | Mean neg. ER (%)   | Mean pos. ER (%) | Mean neg. ER (%)       | Mean pos. ER (%) | Mean neg. ER (%)   | Mean pos. ER (%) |
| Sorting Method Only .....                                             | −5.68                  | 9.96             | −5.98              | 9.91             | −6.92                  | 5.43             | −7.06              | 5.71             |
| Sorting Method with Negative Constraint .....                         | −3.11                  | 9.96             | −3.38              | 9.91             | −3.35                  | 5.43             | −3.16              | 5.89             |
| Sorting Method with Sliding Scale <sup>85</sup> .....                 | −2.27                  | 5.28             | −2.49              | 5.32             | −3.07                  | 2.21             | −3.21              | 2.45             |
| Sorting Method, Sliding Scale & Negative Constraint (Finalized) ..... | −1.50                  | 5.28             | −1.66              | 5.32             | −1.71                  | 2.21             | −1.86              | 2.47             |

<sup>82</sup> Exiting outlier issuer risk score error rates are currently applied to the plan liability risk scores and risk adjustment transfer amounts for the benefit year being audited if they are a positive error rate outlier. For all other outlier issuers, risk score error rates are currently applied to the plan liability risk scores and risk adjustment transfer amounts for the current transfer year. As detailed in Section II.B, we are finalizing the transition to the concurrent application of HHS-RADV results such that issuer risk score error rates for non-exiting issuers will

also be applied to the risk scores and transfer amounts for the benefit year being audited beginning with the 2020 benefit year of HHS-RADV.

<sup>83</sup> See 45 CFR 153.350(c).

<sup>84</sup> These estimates reflect the exclusion from outlier status of those issuers with fewer than 30 HCCs in an HCC group, consistent with the policy finalized in the 2021 Payment Notice (85 FR 29164), which was not in effect for 2017 or 2018 benefit

year HHS-RADV. We excluded issuers with fewer than 30 HCCs from outlier status in these estimates to provide a sense of the impact of the proposed changes when compared to the methodology presently in effect for 2019 benefit year HHS-RADV and beyond.

<sup>85</sup> This analysis reflects the sliding scale policy finalized in Section II.A.2. of this rule which creates a sliding scale adjustment from +/−1.645 to 3 standard deviations.

### B. Application of HHS–RADV Results

In the 2014 Payment Notice, HHS finalized a prospective approach for making adjustments to risk adjustment transfers based on findings from the HHS–RADV process.<sup>86</sup> Specifically, we finalized using an issuer's HHS–RADV error rates from the prior year to adjust the issuer's average risk score in the current benefit year. As such, we used the 2017 benefit year HHS–RADV results to adjust 2018 benefit year risk adjustment plan liability risk scores for non-exiting issuers, resulting in adjustments to 2018 benefit year risk adjustment transfer amounts.<sup>87 88</sup>

When we finalized the prospective HHS–RADV results application policy in the 2014 Payment Notice, we did not anticipate the extent of the changes that could occur in the risk profile of enrollees or market participation in the individual and small group markets from benefit year to benefit year. As a result of experience with these changes over the early years of the program, and in light of the timeline for the reporting, collection, and disbursement of HHS–RADV adjustments to transfers<sup>89</sup> and the changes to the risk adjustment holdback policy,<sup>90</sup> both of which lead to reopening of prior year risk adjustment transfers, we proposed to switch away from the prospective approach for non-exiting issuers. We proposed to make the transition and apply HHS–RADV results to the benefit year being audited for all issuers starting with the 2021 benefit year of HHS–RADV. We proposed applying HHS–RADV results to the benefit year being audited for all issuers in an effort to address

stakeholder concerns about maintaining actuarial soundness in the application of an issuer's HHS–RADV error rate if an issuer's risk profile, enrollment, or market participation changes substantially from benefit year to benefit year.

In the proposed rule, we explained that if we finalized and implemented the policy to adjust the benefit year being audited beginning with the 2021 benefit year HHS–RADV, we would need to adopt transitional measures to move from the current prospective approach to one that applies the HHS–RADV results to the benefit year being audited. More specifically, 2021 benefit year risk adjustment plan liability risk scores and transfers would need to be adjusted first to reflect 2020 benefit year HHS–RADV results, and adjusted again based on 2021 benefit year HHS–RADV results. Then, for the 2022 benefit year of HHS–RADV and beyond, risk adjustment plan liability risk scores and transfers would only be adjusted once based on the same benefit year's HHS–RADV results (that is, 2022 benefit year HHS–RADV results would adjust 2022 benefit year risk adjustment plan liability risk scores and transfers).<sup>91</sup>

In order to effectuate this transition, we proposed an “average error rate approach,” as set forth in the 2019 RADV White Paper, under which HHS would calculate an average value for the 2021 and 2020 benefit years' HHS–RADV error rates and apply this average error rate to 2021 plan liability risk scores and risk adjustment transfers.<sup>92</sup> This approach would result in one final HHS–RADV adjustment to 2021 benefit year plan liability risk scores and risk adjustment transfers, reflecting the average value for the 2021 and 2020 benefit years' HHS–RADV error rates. The adjustments to transfers would be collected and paid in accordance with the 2021 benefit year HHS–RADV timeline.<sup>93</sup>

However, in an effort to be consistent with our current risk score error rate application and calculation and ensure that both years of HHS–RADV results were taken into consideration in calculating risk adjustment plan liability risk scores, we also proposed an alternative approach: the “combined plan liability risk score option.” Under

the combined plan liability risk score option, we would apply 2020 benefit year HHS–RADV risk score adjustments to 2021 benefit year plan liability risk scores, and then apply 2021 benefit year HHS–RADV risk score adjustments to the adjusted 2021 plan liability risk scores. We would then use the final adjusted plan liability risk scores (reflecting both the 2020 and 2021 HHS–RADV adjustments to risk scores) to adjust 2021 benefit year transfers. Under this proposal, HHS would calculate risk score adjustments for 2020 and 2021 benefit year HHS–RADV sequentially and incorporate 2020 and 2021 benefit year HHS–RADV results in one final adjustment amount to 2021 benefit year transfers. We sought comment on both of these approaches to transition from the current prospective approach to one that applies the HHS–RADV results to the benefit year being audited.

We also explained in the proposed rule that the transition to a policy to apply HHS–RADV results to the benefit year being audited for all issuers would remove the need to continue the current policy on issuers entering sole issuer markets finalized in the 2020 Payment Notice.<sup>94</sup> As finalized in the 2020 Payment Notice, new issuer(s) that enter a new market or a previously sole issuer market have their risk adjustment transfers in the current benefit year adjusted if there was an outlier issuer in the applicable state market risk pool in the prior benefit year's HHS–RADV.<sup>95</sup> We further explained that if the proposal to apply HHS–RADV results to the benefit year being audited for all issuers is finalized, new issuers, including new issuers in previously sole issuer markets, would no longer be impacted by HHS–RADV results from a previous benefit year; rather, the new issuer would only have their current benefit year risk scores (and subsequently, risk adjustment transfers) impacted if there was an outlier issuer in the same state market risk pool.

We also sought comment on an alternative timeline, in which HHS would apply HHS–RADV results to the benefit year being audited for all issuers starting with the 2020 benefit year of HHS–RADV, rather than the 2021 benefit year. We explained that under the alternative timeframe, 2020 benefit year risk adjustment plan liability risk scores and transfers would need to be adjusted twice—first to reflect 2019 benefit year HHS–RADV results and again based on 2020 benefit year HHS–RADV results. Lastly, we sought

<sup>86</sup> See 78 FR 15410 at 15438.

<sup>87</sup> See the Summary Report of 2017 Benefit Year HHS–RADV Adjustments to Risk Adjustment Transfers released on August 1, 2019, available at: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/BY2017-HHSRADV-Adjustments-to-RA-Transfers-Summary-Report.pdf>.

<sup>88</sup> In the 2019 Payment Notice, we adopted an exception to the prospective application of HHS–RADV results for exiting issuers, whereby risk score error rates for outlier exiting issuers are applied to the plan liability risk scores and transfer amounts for the benefit year being audited. Therefore, for exiting issuers, we used the 2017 benefit year's HHS–RADV results to adjust 2017 benefit year plan liability risk scores, resulting in adjustments to 2017 benefit year risk adjustment transfer amounts. See 83 FR at 16965–16966. We updated this policy to only apply HHS–RADV results for exiting issuers that are positive error rate outliers beginning with the 2018 benefit year. See the 2020 Payment Notice, 84 FR at 17503–17504.

<sup>89</sup> See 84 FR at 17504 through 17508.

<sup>90</sup> See the Change to Risk Adjustment Holdback Policy for the 2018 Benefit Year and Beyond Bulletin (May 31, 2019) (May 2019 Holdback Guidance), available at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Change-to-Risk-Adjustment-Holdback-Policy-for-the-2018-Benefit-Year-and-Beyond.pdf>.

<sup>91</sup> As discussed in the May 2019 Holdback Guidance, a successful HHS–RADV appeal may require additional adjustments to transfers for the applicable benefit year in the impacted state market risk pool.

<sup>92</sup> See Section 5.2 of the 2019 RADV White Paper.

<sup>93</sup> For a general description of the current timeline for reporting, collection, and disbursement of HHS–RADV adjustments to transfers, see 84 FR at 17506 through 17507.

<sup>94</sup> 84 FR at 17504.

<sup>95</sup> *Ibid.*



comment on whether, if we finalized and implemented either of the transition options using the alternative timeline, we should also pilot RXCs for the 2020 benefit year HHS–RADV.

We are finalizing the proposed transition from the current prospective application of HHS–RADV results for non-exiting issuers and will apply HHS–RADV audit findings to the benefit year being audited for all issuers, starting with the 2020 benefit year HHS–RADV, by combining 2019 and 2020 benefit years HHS–RADV results for non-exiting issuers following the average error rate approach. We also reaffirm that, as a result of finalizing these changes, we will not need to continue the current policy on issuers entering sole issuer markets after the transition is effectuated. Therefore, if a new issuer entered a state market risk pool in 2020, its risk adjustment plan liability risk score(s) and transfer for 2020 benefit year risk adjustment could be impacted by the new issuer's own 2020 HHS–RADV results and the combined 2019 and 2020 HHS–RADV results of other issuers in the same state market risk pool. For exiting issuers, HHS will continue to adjust only for positive error rate outliers, as opposed to both positive and negative error rate outliers.<sup>96</sup> Beginning with the 2021 benefit year of HHS–RADV, plan liability risk scores and risk adjustment transfers will only be adjusted once based on the same benefit year's HHS–RADV results (that is, 2021 benefit year HHS–RADV results would adjust 2021 benefit year plan liability risk scores and transfers for all issuers).<sup>97</sup> Additionally, HHS will continue to pilot RXCs for the 2020 benefit year.

We are finalizing this change to apply HHS–RADV results to the benefit year being audited for all issuers to address stakeholder concerns about maintaining actuarial soundness in the application of an issuer's HHS–RADV error rate if an issuer's risk profile, enrollment, or market participation changes substantially from benefit year to benefit year. In addition, this change has the potential to provide more stability for issuers of risk adjustment covered plans and help them better predict the impact of HHS–RADV results. Once the

transition is effectuated, it will also prevent situations in which an issuer who newly enters a state market risk pool, including new market entrants to a sole issuer market, is subject to HHS–RADV adjustments from the prior benefit year for which they did not participate.

*Comments:* The majority of commenters supported switching from the prospective application of the HHS–RADV results to the benefit year being audited. These commenters generally agreed that having a concurrent application would maintain actuarial soundness in the application of an issuer's HHS–RADV error rate, provide stability to HHS–RADV results, and promote fairness in the HHS–RADV process. One commenter suggested that HHS should consider maintaining the current prospective application of HHS–RADV findings; another commenter suggested HHS exempt new issuers from having their transfers adjusted due to HHS–RADV.

Regarding the transition year, some commenters supported switching to the concurrent application in the 2021 benefit year as proposed due to concerns that changing the transition year to the 2020 benefit year of HHS–RADV would heighten the already significant uncertainty surrounding 2020 as a result of COVID–19, with one commenter noting that issuers did not account for this change in their 2020 pricing. However, most commenters supported switching to the concurrent application with the 2020 benefit year, suggesting that it would be most appropriate to transition to a concurrent application as early as possible and one cited to the various changes to the HHS–operated risk adjustment program beginning with the 2021 benefit year as further support for the alternative timeline for the transition. One commenter requested additional information on the 2020 benefit year HHS–RADV timeline.

*Response:* We are finalizing the proposal to switch from the current prospective application of the HHS–RADV results to the benefit year being audited, starting with the 2020 benefit year. As previously noted, when we finalized the prospective HHS–RADV results application policy, we did not anticipate the extent of changes that could occur in the risk profile of enrollees or market participation by issuers from benefit year to benefit year. As a result of experience over the early years of the program, we believe that transitioning to apply HHS–RADV results on a concurrent basis for all issuers will provide greater stability, promote fairness, and enhance actuarial

soundness, specifically in the event that an issuer's risk profile, enrollment, or market participation changes significantly from benefit year to benefit year. In light of the other changes to HHS–RADV program operations described in this rule which will lead to reopening of prior benefit year risk adjustment transfers,<sup>98</sup> it is also no longer necessary to apply HHS–RADV results on a prospective basis to allow time to complete the discrepancy and appeals processes to avoid having to reopen prior year transfers. We also agree that we should begin the application of the results on a concurrent basis as soon as possible and will implement the policy starting with the 2020 benefit year. We believe that starting with the 2020 benefit year will add stability in the midst of the COVID–19 pandemic, as the results from the 2019 and 2020 benefit years of HHS–RADV will be averaged together to calculate the adjustment to 2020 benefit year risk adjustment risk scores. We believe this added stability will account for concerns that issuers did not take this proposed change into consideration when setting rates for the 2020 benefit year. We also agree with the commenter who cited the risk adjustment program updates that apply beginning with the 2021 benefit year as further support for effectuating the transition beginning with the 2020 benefit year.<sup>99</sup>

We did not propose and are not finalizing a new exemption from HHS–RADV for new market entrants. The inclusion of new market entrants in HHS–RADV ensures that those issuers' actuarial risk for the applicable benefit year is accurately reflected in risk adjustment transfers, and that the HHS–operated risk adjustment program assesses charges to plans with lower-than-average actuarial risk while making payments to plans with higher-than-average actuarial risk. However, new market entrants will no longer be impacted by a prior year's HHS–RADV results and will only be impacted by the results from the benefit year under which they participated in the state market risk pool after the transition is effectuated.<sup>100</sup>

<sup>98</sup> Ibid.

<sup>99</sup> For example, in the 2021 Payment Notice, we finalized several updates to the HHS–HCC clinical classification to develop updated risk factors that apply beginning with the 2021 benefit year risk adjustment models. See 85 FR at 29175.

<sup>100</sup> As noted above, a new entrant to a state market risk pool in 2020 would see its risk score(s) and transfer impacted by the new issuer's own 2020 HHS–RADV results, the combined 2019 and 2020 HHS–RADV results of other non-exiting issuers in the same state market risk pool, and the 2020 HHS–RADV results for positive error rate outlier exiting

<sup>96</sup> In addition, positive error rate outlier issuers' 2019 and 2020 HHS–RADV results will be applied to the risk scores and transfers for the benefit year being audited. The average error rate approach is not applicable because exiting issuers who participated in 2019 HHS–RADV would not have 2020 benefit year risk scores or transfers to adjust.

<sup>97</sup> As discussed in the May 2019 Holdback Guidance, a successful HHS–RADV appeal may require additional adjustments to transfers for the applicable benefit year in the impacted state market risk pool.

HHS intends to provide more information on the 2020 benefit year HHS–RADV timeline in the future, but generally anticipates it will commence as usual with the release of samples in May 2021. As previously noted in this rule, HHS has provided details on the updated timeline on the activities for 2019 benefit year HHS–RADV.<sup>101</sup>

*Comments:* Most commenters who submitted comments on the options for combining HHS–RADV results during the transition period supported using the average error rate approach, noting that it would provide more stability and transparency than the combined plan liability risk score option. One commenter who expressed a preference for the average error rate approach cited concerns with the amplifying effect of adjusting risk scores twice under the plan liability risk score option. Most commenters who supported the average error rate approach supported effectuating the transition using 2019 and 2020 benefit years' error rate results. These commenters noted that aggregating the results of these 2 years could reduce volatility and smooth over potential challenges issuers may face when conducting HHS–RADV audits for these benefit years due to the COVID–19 public health emergency. A few commenters who supported use of the average error rate approach urged HHS to implement the transition and use 2020 and 2021 benefit years' results, suggesting it would be the most straightforward approach. One commenter requested clarification as to whether the average error rate approach would use a weighted average error rate.

A few commenters supported the combined plan liability risk score option for the transition years of HHS–RADV. One of these commenters believed that the combined plan liability risk score option would be a fairer way to provide consistency, while a different commenter that supported the combined plan liability risk score option was concerned that the average error rate approach would reduce the otherwise applicable HHS–RADV adjustment. Another commenter compared the two alternative approaches, noting that the average error rate would align well with some issuers' practices, while the combined liability risk score option would align

better with other issuers' financial reporting.

*Response:* We are finalizing the use of the average error rate approach to transition to the concurrent application of HHS–RADV results for non-exiting issuers by combining their 2019 and 2020 benefit years' HHS–RADV results. In response to comments we clarify that for simplification purposes, HHS will apply an unweighted average value of the 2019 and 2020 benefit years' HHS–RADV results to adjust 2020 benefit year risk scores and transfers. We proposed using a combined plan liability risk score as an alternative option, believing that it could provide a more consistent transition to a concurrent application of HHS–RADV results. However, the majority of comments on these transition options emphasized the extent to which they believed an average error rate approach will actually provide greater stability and transparency for the HHS–RADV adjustments applied during the transition period. After consideration of comments, we agree that the average error rate approach will be the optimal transitional approach. More specifically, aggregating the 2019 and 2020 benefit years' results for non-exiting issuers and using the unweighted average value of those benefit years' HHS–RADV results to adjust transfers will allow for more consistency, reduce potential volatility, and better accommodate any potential disparities or challenges due to COVID–19. As noted previously, we also believe the transition to the application of the results on a concurrent basis should be implemented as soon as possible and therefore will start the concurrent application of HHS–RADV results for all issuers starting with the 2020 benefit year. We recognize that there are advantages to the combined plan liability risk score option, which is why we proposed it for combining HHS–RADV results for the transition years. However, for the reasons outlined above, we believe the average error rate method is the more balanced approach to effectuate the transition and combine 2019 and 2020 HHS–RADV results for non-exiting issuers.

*Comments:* Some commenters suggested HHS cancel either the 2019 or 2020 benefit years of HHS–RADV. One of these commenters expressed concern that the COVID–19 pandemic could potentially skew the 2020 benefit year HHS–RADV results. Other commenters stated that COVID–19 would make it difficult for providers to respond to issuer requests for the medical documentation needed to complete audits, which they noted could skew HHS–RADV results.

*Response:* We appreciate the concerns related to the potential impact of COVID–19, but are not cancelling HHS–RADV for either the 2019 or 2020 benefit year. We believe that cancelling either year of this program would be detrimental to program integrity and would result in future difficulties monitoring HHS–RADV trends. We acknowledge that the COVID–19 pandemic puts a number of stressors on providers and issuers. Recognizing the impact of the public health emergency on HHS–RADV activities, we postponed the start of 2019 benefit year HHS–RADV activities.<sup>102</sup> As recently announced, IVA samples for 2019 benefit year HHS–RADV will be released in January 2021 and we anticipate 2020 benefit year HHS–RADV will commence as usual.<sup>103</sup> We will continue to monitor the COVID–19 public health emergency and will consider whether additional flexibilities for HHS–RADV are appropriate. Further, as noted above, the adoption of the average error rate approach for the transition to the concurrent application of HHS–RADV is intended to help reduce volatility related to potential challenges issuers may face when conducting HHS–RADV audits for these benefit years due to the COVID–19 public health emergency.

*Comments:* Most commenters supported continuing the pilot of RXCs for the 2020 benefit year. Some of these commenters suggested that continuing to pilot RXCs would allow for more consistency between 2019 and 2020 and support transitioning to the concurrent application of HHS–RADV results starting with the 2020 benefit year, while another commenter believed that it would minimize the amount of changes occurring at once. One commenter noted that extending the RXC pilot would benefit the issuers who are still learning how to conduct HHS–RADV for RXCs. Another commenter did not believe it would be necessary to continue piloting RXCs in 2020, but acknowledged that an additional pilot period would allow issuers to focus on HHS–RADV during the COVID–19 pandemic, rather than adjusting to new aspects of HHS–RADV reporting.

*Response:* After consideration of comments, we are finalizing the continuation of the pilot for RXCs for the 2020 benefit year. Extending the RXC pilot an additional benefit year will increase consistency between the

issuers in the same state market risk pool. However, a new entrant to a state market risk pool in 2021 would see its risk score(s) and transfer impacted by 2021 HHS–RADV results only.

<sup>101</sup> See the “2019 Benefit Year HHS–RADV Activities Timeline” [https://www.regtap.info/uploads/library/HRADV\\_Timeline\\_091020\\_5CR\\_091020.pdf](https://www.regtap.info/uploads/library/HRADV_Timeline_091020_5CR_091020.pdf).

<sup>102</sup> <https://www.cms.gov/files/document/2019-HHS-RADV-Postponement-Memo.pdf>.

<sup>103</sup> See the “2019 Benefit Year HHS–RADV Activities Timeline” [https://www.regtap.info/uploads/library/HRADV\\_Timeline\\_091020\\_5CR\\_091020.pdf](https://www.regtap.info/uploads/library/HRADV_Timeline_091020_5CR_091020.pdf).

operations of the 2019 and 2020 benefit years' HHS–RADV and facilitate the combination of the HHS–RADV adjustments for these benefit years as we transition to a concurrent application of HHS–RADV results starting with the 2020 benefit year. We agree with commenters who suggested that an additional pilot year for RXCs would benefit issuers and provide an opportunity to continue to improve their internal process for conducting HHS–RADV for RXCs.

### III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Under this final rule, we are finalizing the modifications to the calculation of error rates to modify the HCC failure rate grouping methodology for HCCs that share an HCC coefficient estimation group in the adult risk adjustment models; to calculate and apply a sliding scale adjustment for cases where outlier issuers are near the confidence intervals; and to constrain the error rate calculation for issuers with negative failure rates. We are also finalizing the transition from the current prospective application of HHS–RADV results<sup>104</sup> to apply the results to the benefit year being audited. These are methodological changes to the error estimation used in calculating error rates and changes to the application of HHS–RADV results to risk scores and transfers. Since HHS calculates error rates and applies HHS–RADV results to risk scores and transfers, we did not estimate a burden change on issuers to conduct and complete HHS–RADV in states where HHS operates the risk adjustment program for a given benefit year.<sup>105</sup>

### IV. Regulatory Impact Statement

#### A. Statement of Need

This rule finalizes standards related to HHS–RADV, including certain refinements to the calculation of error rates and a transition from the prospective application of HHS–RADV

results. The Premium Stabilization Rule and other rulemakings noted earlier provided detail on the implementation of HHS–RADV.

#### B. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act (the Act), section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A Regulatory Impact Analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). This rule does not reach the economic significance threshold, and thus is not considered a major rule. For the same reason, it is not a major rule under the Congressional Review Act.

#### C. Regulatory Alternatives Considered

In developing the policies contained in this final rule, we considered numerous alternatives to the presented policies. Below we discuss the key regulatory alternatives considered.

We considered an alternative approach to the sorting of all HCCs that share an HCC coefficient estimation group in the adult models into the same “Super HCC” for HHS–RADV HCC grouping purposes. This alternative approach would have combined all HCCs in the same hierarchy into the same Super HCC for HHS–RADV HCC grouping purposes even if those HCCs had different coefficients in the risk adjustment models. While we did analyze this option, we were concerned that it would not account for risk differences within the HCC hierarchies, and that the finalized approach that focuses on HCCs that share an HCC coefficient estimation group and have the same risk scores in the adult models would better ensure that HHS–RADV

results account for risk differences within HCC hierarchies. Additionally, by forcing all HCCs that share a hierarchy into the same HHS–RADV failure rate grouping regardless of whether they have different coefficients, we would not only diminish our ability to allow for differences among various diseases within an HCC hierarchy but would also reduce our ability to recognize differences in the difficulty of providing medical documentation for them.<sup>106</sup>

We considered several other options for addressing the payment cliff effect besides the specific sliding scale adjustment that we are finalizing. One option was returning to the original methodology finalized in the 2015 Payment Notice, which would have adjusted almost all issuers' risk scores for every error identified as a result of HHS–RADV.<sup>107</sup> The adjustments under the original methodology would have used the issuer's corrected average risk score to compute an adjustment factor, which would have been based on the ratio between the corrected and original average risk scores. However, our analysis indicated that the original methodology generally resulted in less stability, since the vast majority of outlier issuers had their original failure rates applied without the benefit of subtracting the weighted mean difference.<sup>108</sup> In addition, while the original methodology did not specifically result in a payment cliff effect, it would have resulted in more and larger adjustments to transfers.

The second option we considered to mitigate the impact of the payment cliff was to modify the error rate calculation by calculating the issuer's GAF using the HCC group confidence interval rather than the distance to the weighted HCC group mean. As described in the 2019 RADV White Paper and in previous rulemaking,<sup>109</sup> we had concerns that this option would result in under-adjustments based on HHS–RADV results for issuers farthest from the confidence intervals. Thus, although this option could address the payment cliff effect for issuers just outside of the confidence interval, it also could create the unintended consequence of mitigating the payment impact for situations where issuers are not close to the confidence intervals, potentially reducing incentives for issuers to submit

<sup>104</sup> The exception to the current prospective application of HHS–RADV results is for exiting issuers identified as positive error rate outliers, whose HHS–RADV results are applied to the risk scores and transfer amounts for the benefit year being audited.

<sup>105</sup> Since the 2017 benefit year, HHS has been responsible for operating risk adjustment in all 50 states and the District of Columbia.

<sup>106</sup> See 83 FR 16961 and 16965.

<sup>107</sup> See 79 FR 13755–13770.

<sup>108</sup> See the 2019 RADV White Paper at pages 78–79 and Appendix B.

<sup>109</sup> See 84 FR 17507–17508. See also the 2019 RADV White Paper at page 80.

accurate risk adjustment data to their EDGE servers.

An additional option suggested by some stakeholders that could address, at least in part, the payment cliff effect that we considered would be to modify the two-sided approach to HHS–RADV and only adjust issuers who are positive error rate outliers. However, moving to a one-sided outlier identification methodology would not have addressed the payment cliff effect because it would still exist on the positive error rate side of the methodology.<sup>110</sup> In addition, the two-sided outlier identification, and the resulting adjustments to outlier issuer risk scores that have significantly better-than-average or poorer-than-average data validation results, ensures that HHS–RADV adjusts for identified, material risk differences between what issuers submitted to their EDGE servers and what was validated by the issuers' medical records during HHS–RADV. The two-sided outlier identification approach ensures that an issuer who is coding well is able to recoup funds that might have been lost through risk adjustment because its competitors are coding badly.

We also considered various other options for the thresholds under the sliding scale option to mitigate the payment cliff effect. For example, we considered as an alternative the adoption of a sliding scale option that would adjust outlier issuers' error rates on a sliding scale between the 95 and 99.7 percent confidence interval bounds (from  $\pm 1.96$  to 3 standard deviations). This alternative sliding scale option would retain the current methodology's confidence interval at 1.96 standard deviations, the full adjustment to the mean failure rate for issuers outside of the 99.7 percent confidence interval (beyond three standard deviations), and the current significant adjustment to the HCC group weighted mean after three standard deviations. Commenters supported this sliding scale option because it addressed the payment cliff issue without increasing the number of issuers identified as outliers. However, while we recognized that this alternative also would mitigate the payment cliff effect, it would weaken HHS–RADV by reducing its overall impact and the magnitude of HHS–

RADV adjustments to outlier issuer's risk scores.

When developing a process for implementing the transition from the prospective application of HHS–RADV results to a concurrent application approach, we considered three options for the transition year. In previous sections of this rule, we described two of those options. The third option is the “RA transfer option.” The RA transfer option would separately calculate 2019 benefit year HHS–RADV adjustments to 2020 benefit year transfers and 2020 benefit year HHS–RADV adjustments to 2020 benefit year transfers.<sup>111</sup> Under this option, we would then calculate the difference between each of these values and the unadjusted 2020 benefit year transfers before any HHS–RADV adjustments were applied, and add these differences together to arrive at the total HHS–RADV adjustment that would be applied to the 2020 benefit year transfers. That is, HHS would separately calculate adjustments for the 2019 and 2020 benefit year HHS–RADV results and incorporate 2019 and 2020 benefit year HHS–RADV results in one final adjustment to 2020 benefit year transfers that would be collected and paid in accordance with the 2020 benefit year HHS–RADV timeline.<sup>112</sup> However, we believe this alternative is not as consistent with our current risk score error rate application and calculation as the combined plan liability risk score option, or as simple as the average error rate approach being finalized.

## V. Regulatory Flexibility Act

The RFA (5 U.S.C. 601 *et seq.*) requires agencies to prepare an initial regulatory flexibility analysis to describe the impact of a proposed rule on small entities, unless the head of the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. The RFA generally defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of “small entity.” HHS uses a change in revenues of more than 3 to 5 percent as its measure of significant economic impact on a substantial number of small entities.

<sup>111</sup> See section 5.2 of the 2019 RADV White Paper.

<sup>112</sup> For a general description of the current timeline for publication, collection, and distribution of HHS–RADV adjustments to transfers, see 84 FR at 17506–17507.

In this final rule, we establish standards for HHS–RADV. This program is generally intended to ensure the integrity of the HHS-operated risk adjustment program, which stabilizes premiums and reduces the incentives for issuers to avoid higher-risk enrollees. Because we believe that insurance firms offering comprehensive health insurance policies generally exceed the size thresholds for “small entities” established by the SBA, we do not believe that an initial regulatory flexibility analysis is required for such firms.

We believe that health insurance issuers would be classified under the North American Industry Classification System code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of \$41.5 million or less would be considered small entities for these North American Industry Classification System codes. Issuers could possibly be classified in 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be \$35.0 million or less.<sup>113</sup> We believe that few, if any, insurance companies underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) fall below these size thresholds. Based on data from MLR annual report<sup>114</sup> submissions for the 2017 MLR reporting year, approximately 90 out of 500 issuers of health insurance coverage nationwide had total premium revenue of \$41.5 million or less. This estimate may overstate the actual number of small health insurance companies that may be affected, since over 72 percent of these small companies belong to larger holding groups, and many, if not all, of these small companies are likely to have non-health lines of business that will result in their revenues exceeding \$41.5 million.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This final rule would not affect small rural hospitals. Therefore, the Secretary has determined that this final

<sup>110</sup> It is important to note the purpose of HHS–RADV approach is fundamentally different from the Medicare Advantage risk adjustment data validation (MA–RADV) approach. MA–RADV only adjusts for positive error rate outliers, as the program's intent is to recoup Federal funding that was the result of improper payments under the Medicare Part C program.

<sup>113</sup> <https://www.sba.gov/document/support-table-size-standards>.

<sup>114</sup> Available at <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr.html>.

rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

#### VI. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a proposed rule that includes any federal mandate that may result in expenditures in any 1 year by state, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold is approximately \$156 million. Although we have not been able to quantify all costs, we expect the combined impact on state, local, or Tribal governments and the private sector to be below the threshold.

#### VII. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule that imposes substantial direct costs on state and local governments, preempts state law, or otherwise has federalism implications.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policymaking discretion of the states, we have engaged in efforts to consult with and work cooperatively with affected states, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners, and consulting with state insurance officials on an individual basis.

While developing this final rule, we attempted to balance the states' interests in regulating health insurance issuers with the need to ensure market stability and adopt refinements to HHS-RADV standards. By doing so, it is our view that we have complied with the requirements of Executive Order 13132.

Because states have flexibility in designing their Exchange and Exchange-related programs, state decisions will ultimately influence both administrative expenses and overall premiums. States are not required to establish an Exchange or risk adjustment program. HHS operates risk adjustment on behalf of any state that does not elect to do so. Beginning with the 2017 benefit year, HHS has operated risk adjustment for all 50 states and the District of Columbia.

In our view, while this final rule would not impose substantial direct requirement costs on state and local governments, it has federalism

implications due to direct effects on the distribution of power and responsibilities among the state and Federal Governments relating to determining standards about health insurance that is offered in the individual and small group markets.

#### VIII. Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771 requires that the costs associated with significant new regulations "to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." This final rule is not subject to the requirements of Executive Order 13771 because it is expected to result in no more than de minimis costs.

#### IX. Conclusion

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

Dated: November 18, 2020.

**Seema Verma**,  
Administrator, Centers for Medicare & Medicaid Services.

Dated: November 23, 2020.

**Alex M. Azar II**,  
Secretary, Department of Health and Human Services.

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### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

##### 50 CFR Part 635

[Docket No.: 201124-0317]

RTID 0648-XT038

#### Atlantic Highly Migratory Species; 2021 Atlantic Shark Commercial Fishing Year

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

**ACTION:** Final rule; fishing season notification.

**SUMMARY:** This final rule establishes the 2021 opening date for all Atlantic shark fisheries, including the fisheries in the Gulf of Mexico and Caribbean. This final rule also establishes the shark fisheries quotas for the 2021 fishing year, with adjustments based on harvest levels during 2020, and establishes the large coastal shark (LCS) retention limits for directed shark limited access permit

holders. NMFS may increase or decrease these retention limits for directed shark limited access permit holders during the year, in accordance with existing regulations, to provide equitable fishing opportunities for commercial shark fishermen in all regions and areas, to the extent practicable. These actions could affect fishing opportunities for commercial shark fishermen in the northwestern Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea.

**DATES:** This rule is effective on January 1, 2021. The 2021 Atlantic commercial shark fishing year opening dates and quotas are provided in Table 1 under **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** Atlantic Highly Migratory Species (HMS) Management Division, 1315 East-West Highway, Silver Spring, MD 20910; <https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species>.

**FOR FURTHER INFORMATION CONTACT:** Lauren Latchford ([lauren.latchford@noaa.gov](mailto:lauren.latchford@noaa.gov)), Guy Eroh ([guy.eroh@noaa.gov](mailto:guy.eroh@noaa.gov)), or Karyl Brewster-Geisz ([karyl.brewster-geisz@noaa.gov](mailto:karyl.brewster-geisz@noaa.gov)) at 301-427-8503.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The Atlantic commercial shark fisheries are managed primarily under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments are implemented by regulations at 50 CFR part 635. For the Atlantic commercial shark fisheries, the 2006 Consolidated HMS FMP and its amendments established, among other things, measures related to commercial shark retention limits, commercial quotas for species and management groups, and accounting for under- and overharvests in the shark fisheries. Regulations include adaptive management measures, such as flexibility in establishing opening dates for the fishing season and the ability to make inseason trip limit adjustments, which provide management flexibility in furtherance of equitable fishing opportunities, to the extent practicable, for commercial shark fishermen in all regions and areas.

On September 29, 2020, NMFS published a proposed rule (85 FR 60947) regarding management measures for the commercial shark fisheries for the 2021 fishing year. The rule proposed opening all Atlantic commercial shark management groups on January 1, 2021, setting initial retention limits for large coastal sharks (LCS) by directed shark

limited access permit holders, and adjusting certain quotas for the 2021 fishing year based on harvest levels during 2020. The proposed rule contains background information and details that are not repeated here. The comment period on the proposed rule closed on October 29, 2020. NMFS received six written comments during the comment period. Those comments, along with NMFS' responses, are summarized below. After considering all the comments, NMFS is finalizing the rule as proposed.

Specifically, NMFS is opening the fishing year for all shark management groups on January 1, 2021. As described in the proposed rule, in establishing the opening date, NMFS considered the "opening commercial fishing season" criteria at 50 CFR 635.27(b)(3). These criteria include the following factors: Available annual quotas for the current fishing season; estimated season length and average weekly catch rates from previous years; length of the season and fishermen participation in past years; impacts to accomplishing objectives of the 2006 Consolidated HMS FMP and its amendments; temporal variation in behavior or biology of target species (e.g., seasonal distribution or abundance); impact of catch rates in one region on another; and effects of delayed season openings. This final rule also establishes a starting retention limit for directed shark limited access permit holders in the blacktip, aggregated LCS, and hammerhead management groups of 45 LCS other than sandbar sharks per vessel per trip for the entire Gulf of Mexico region (which includes both the eastern and western sub-regions), and 36 LCS other than sandbar sharks per vessel per trip for the Atlantic region. This final rule does not affect or change the current retention limit for incidental shark limited access permit holders for all regions. Consistent with § 635.24(a)(3) and (4), the current retention limit will remain at 3 LCS other than sandbar sharks per vessel per trip, and no more than 16 small coastal sharks (SCS) and pelagic sharks, combined, per vessel per trip. Additionally, the retention limit for blacknose sharks for all permit holders in the Atlantic region south of 34°00' N lat. will remain at eight blacknose sharks per trip consistent with § 635.24(a)(4). Blacknose sharks may not be harvested in the Gulf of Mexico region.

This final rule adjusts certain annual commercial quotas for 2021 based on over- and/or underharvests, calculated after accounting for landings reported by October 9, 2020, consistent with existing regulations. Updated landings

information as of October 9, 2020 has been considered, and no quotas are changed from the proposed rule as a result. While this action adjusts certain quotas as allowable, it does not establish or change the annual baseline commercial quotas established under the 2006 Consolidated HMS FMP and its amendments for any shark management group. The baseline quotas were established under previous actions, and any changes to those baseline quotas would be performed through a separate action.

#### Response to Comments

NMFS received six written comments on the proposed rule from interested members of the public. All written comments can be found at <http://www.regulations.gov/> by searching for NOAA–NMFS–2020–0108–0001. All of the comments received are summarized below.

*Comment 1:* NMFS received four comments requesting a reduction in or prohibition of all commercial shark fishing. One of these comments requested that more research be conducted on shark stocks, and that more international management be considered given the migratory nature of some of these species.

*Response:* These comments are outside the scope of this rulemaking because the purpose of this rulemaking is to adjust certain quotas for the 2021 shark season based on over- and underharvests from the previous years and to set opening dates and commercial retention limits for the 2021 shark season. This action does not reanalyze the overall management measures for sharks, which have been analyzed and implemented through previous rulemaking processes for the 2006 Consolidated HMS FMP and its amendments. This action also does not address international management of shark stocks, although we note that the United States complies with recommendations made by the International Commission for the Conservation of Atlantic Tunas, the Convention on International Trade in Endangered Species, and other international regional fisheries management fora, as appropriate, regarding international management of relevant shark stocks.

*Comment 2:* NMFS received two comments supporting the proposed rule. Although generally supportive overall, one of those comments cautioned against allowing carryover of underharvest for smoothhound and blacktip sharks due to the potential for climate change and other environmental factors to have impacts on those species.

*Response:* With regard to the caution against carryover of underharvest, this portion of the comment is outside the scope of this rulemaking. This action carries out and applies quota adjustment measures that were previously adopted and codified through rulemaking. This action does not alter the underlying regulations governing the process for taking into account over- and underharvests from the previous years and establishing opening dates and commercial retention limits. We note that NMFS is considering shark management measures regarding the carryover of under- and overharvests of quotas in Draft Amendment 14 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (85 FR 60132; September 24, 2020). To provide comments on Draft Amendment 14, please see [www.regulations.gov](http://www.regulations.gov) and search for NOAA–NMFS–2019–0040–0009. More information can also be found at <https://www.fisheries.noaa.gov/action/amendment-14-2006-consolidated-hms-fishery-management-plan-shark-quota-management>. Comments on Draft Amendment 14 can be submitted until December 31, 2020.

#### Changes From the Proposed Rule

After considering public comments, NMFS is finalizing the rule as proposed, without changes regarding the fishing season opening dates, retention limits, or quota harvest thresholds at which to consider adjusting retention limits.

#### 2021 Annual Quotas

This final rule adjusts certain 2021 commercial quotas due to overharvests and/or underharvests in 2020 and previous fishing years, based on landings data received by October 9, 2020. Underharvest adjustments can only be applied to stocks or management groups that are not overfished, have no overfishing occurring, or do not have an unknown status. Also, the underharvest adjustments cannot exceed 50 percent of the base annual quota. The 2021 annual quotas are summarized in Table 1 by species and management group. At this time, NMFS anticipates that landings in dealer reports that are received by NMFS after October 9, 2020, will be accounted for by adjusting certain 2022 quotas, as appropriate, although such landings could also be accounted for in 2021. A description of the quota calculations is provided in the proposed rule and is not repeated here.

TABLE 1—2021 PROPOSED QUOTAS AND OPENING DATE FOR THE ATLANTIC SHARK MANAGEMENT GROUPS

| Region or sub-region   | Management group                             | 2020 Annual quota                | Preliminary 2020 landings <sup>1</sup> | Adjustments <sup>2</sup>       | 2021 Base annual quota           | 2021 Proposed annual quota       |
|------------------------|----------------------------------------------|----------------------------------|----------------------------------------|--------------------------------|----------------------------------|----------------------------------|
|                        |                                              | (A)                              | (B)                                    | (C)                            | (D)                              | (D + C)                          |
| Western Gulf of Mexico | Blacktip Sharks <sup>3</sup>                 | 347.2 mt dw (765,392 lb dw).     | 223.1 mt dw (491,750 lb dw).           | 115.7 mt dw (255,131 lb dw).   | 231.5 mt dw (510,261 lb dw).     | 347.2 mt dw (765,392 lb dw).     |
|                        | Aggregated <sup>4</sup> Large Coastal Sharks | 72.0 mt dw (158,724 lb dw).      | 81.6 mt dw (179,958 lb dw).            |                                | 72.0 mt dw (158,724 lb dw).      | 72.0 mt dw (158,724 lb dw).      |
|                        | Hammerhead Sharks                            | 11.9 mt dw (26,301 lb dw).       | <3.6 mt dw (<8,000 lb dw).             |                                | 11.9 mt dw (26,301 lb dw).       | 11.9 mt dw (26,301 lb dw).       |
| Eastern Gulf of Mexico | Blacktip Sharks <sup>3</sup>                 | 37.7 mt dw (83,158 lb dw).       | 4.0 mt dw (8,809 lb dw).               | 12.6 mt dw (27,719 lb dw).     | 25.1 mt dw (55,439 lb dw).       | 37.7 mt dw (83,158 lb dw).       |
|                        | Aggregated Large Coastal Sharks              | 85.5 mt dw (188,593 lb dw).      | 66.2 mt dw (146,047 lb dw).            |                                | 85.5 mt dw (188,593 lb dw).      | 85.5 mt dw (188,593 lb dw).      |
|                        | Hammerhead Sharks                            | 13.4 mt dw (29,421 lb dw).       | <3.4 mt dw (<7,500 lb dw).             |                                | 13.4 mt dw (29,421 lb dw).       | 13.4 mt dw (29,421 lb dw).       |
| Gulf of Mexico         | Non-Blacknose Small Coastal Sharks           | 112.6 mt dw (248,215 lb dw).     | 46.3 mt dw (102,034 lb dw).            |                                | 112.6 mt dw (248,215 lb dw).     | 112.6 mt dw (248,215 lb dw).     |
|                        | Smoothhound Sharks                           | 504.6 mt dw (1,112,441 lb dw).   | 1.4 mt dw (3,144 lb dw).               | 168.2 mt dw (370,814 lb dw).   | 336.4 mt dw (741,627 lb dw).     | 504.6 mt dw (1,112,441 lb dw).   |
| Atlantic               | Aggregated Large Coastal Sharks              | 168.9 mt dw (372,552 lb dw).     | 54.7 mt dw (120,663 lb dw).            |                                | 168.9 mt dw (372,552 lb dw).     | 168.9 mt dw (372,552 lb dw).     |
|                        | Hammerhead Sharks                            | 27.1 mt dw (59,736 lb dw).       | 13.6 mt dw (30,018 lb dw).             |                                | 27.1 mt dw (59,736 lb dw).       | 27.1 mt dw (59,736 lb dw).       |
|                        | Non-Blacknose Small Coastal Sharks           | 264.1 mt dw (582,333 lb dw).     | 64.7 mt dw (142,611 lb dw).            |                                | 264.1 mt dw (582,333 lb dw).     | 264.1 mt dw (582,333 lb dw).     |
|                        | Blacknose Sharks (South of 34° N lat. only). | 17.2 mt dw (37,921 lb dw).       | 4.0 mt dw (8,848 lb dw).               |                                | 17.2 mt dw (37,921 lb dw).       | 17.2 mt dw (37,921 lb dw).       |
|                        | Smoothhound Sharks                           | 1,802.6 mt dw (3,971,587 lb dw). | 231.8 mt dw (510,957 lb dw).           | 600.9 mt dw (1,323,862 lb dw). | 1,201.7 mt dw (2,649,268 lb dw). | 1,802.6 mt dw (3,971,587 lb dw). |
|                        | No regional quotas                           | 50.0 mt dw (110,230 lb dw).      | 5.3 mt dw (11,792 lb dw).              |                                | 50.0 mt dw (110,230 lb dw).      | 50.0 mt dw (110,230 lb dw).      |
| No regional quotas     | Sandbar Shark Research                       | 90.7 mt dw (199,943 lb dw).      | <18.1 mt dw (<40,000 lb dw).           |                                | 90.7 mt dw (199,943 lb dw).      | 90.7 mt dw (199,943 lb dw).      |
|                        | Blue Sharks                                  | 273.0 mt dw (601,856 lb dw).     | 0 mt dw (0 lb dw).                     |                                | 273.0 mt dw (601,856 lb dw).     | 273.0 mt dw (601,856 lb dw).     |
|                        | Porbeagle Sharks                             | 1.7 mt dw (3,748 lb dw).         | 0 mt dw (0 lb dw).                     |                                | 1.7 mt dw (3,748 lb dw).         | 1.7 mt dw (3,748 lb dw).         |
|                        | Pelagic Sharks Other Than Porbeagle or Blue. | 488.0 mt dw (1,075,856 lb dw).   | 33.8 mt dw (74,442 lb dw).             |                                | 488.0 mt dw (1,075,856 lb dw).   | 488.0 mt dw (1,075,856 lb dw).   |

<sup>1</sup> Landings are from January 1, 2020, through October 9, 2020, and are subject to change.

<sup>2</sup> Underharvest adjustments can only be applied to stocks or management groups that are not overfished have no overfishing occurring, or do not have an unknown status. Also, the underharvest adjustments cannot exceed 50 percent of the base annual quota.

<sup>3</sup> This adjustment accounts for the underharvest in 2020. This final rule would increase the overall Gulf of Mexico blacktip shark quota by 128.3 mt dw (282,850 lb dw). Since any underharvest would be divided based on the sub-regional quota percentage split, the western Gulf of Mexico blacktip shark quota will be increased by 115.7 mt dw, or 90.2 percent of the quota adjustment, while the eastern Gulf of Mexico blacktip shark quota will be increased by 12.6 mt dw, or 9.8 percent of the quota adjustment.

<sup>4</sup> While there is an overharvest of the western Gulf of Mexico Aggregated LCS sub-regional quota in 2020, the full Gulf of Mexico regional quota has not been filled. Thus, this rule maintains the full baseline quota in 2021.

## 2021 Atlantic Commercial Shark Fishing Year

After considering the seven “opening commercial fishing season” criteria listed in § 635.27(b)(3), as described in the proposed rule (85 FR 60947; September 29, 2020), and after considering public comment, this rule establishes a January 1, 2021 commercial shark fishing year start date for all management groups in all regions.

Regarding the LCS retention limit, as shown in Table 2, directed shark limited access permit holders fishing on the Gulf of Mexico blacktip shark, aggregated LCS, and hammerhead shark management groups will start the commercial fishing year with a limit of 45 LCS other than sandbar sharks per vessel per trip. Directed shark limited access permits fishing on the Atlantic aggregated LCS and hammerhead shark management groups will start the commercial fishing year with a limit of 36 LCS other than sandbar sharks per vessel per trip. These retention limits could be changed throughout the year based on consideration of the inseason trip limit adjustment criteria at § 635.24(a)(8).

Specifically, in the Atlantic region, NMFS will closely monitor the quota at the beginning of the year. If it appears that the quota is being harvested too quickly to allow fishermen throughout the entire region the opportunity to fish (e.g., if approximately 40 percent of the quota is caught at the beginning of the year), NMFS will consider reducing the commercial retention limit, potentially to three LCS other than sandbar sharks per vessel per trip. Given the geographic distribution and migration patterns of the sharks at this time of year (i.e., they head north before moving south again later in the year), the retention limit would be adjusted to ensure there is quota available later in the year (see the criteria at § 635.24(a)(8)(i), (ii), (v), and (vi)). Then, based on prior years’ fishing activity, and to allow more consistent fishing opportunities later in the year, NMFS may consider raising the commercial retention limit later in the year. Any future increase or decrease in a retention limit would depend on a review of the inseason trip limit adjustment criteria at § 635.24(a)(8).

All of the shark management groups will remain open until December 31, 2021, or until NMFS determines that the

landings for any shark management group have reached, or are projected to reach, 80 percent of the available overall, regional, and/or sub-regional quota, if the fishery’s landings are not also projected to reach 100 percent of the applicable quota before the end of the season, or when the quota-linked management group is closed. For the blacktip shark management group, regulations at § 635.28(b)(5)(i) through (v) authorize NMFS to close the management group before landings reach or are expected to reach 80 percent of the available overall, regional, and/or sub-regional quota after considering the following criteria and other relevant factors: Season length based on available sub-regional quota and average sub-regional catch rates; variability in regional and/or sub-regional seasonal distribution, abundance, and migratory patterns; effects on accomplishing the objectives of the 2006 Consolidated Atlantic HMS FMP and its amendments; amount of remaining shark quotas in the relevant sub-region; and regional and/or sub-regional catch rates of the relevant shark species or management groups. Additionally, NMFS has previously



established non-linked and linked quotas; linked quotas are explicitly designed to concurrently close multiple shark management groups that are caught together to prevent incidental catch mortality from exceeding the total allowable catch. The linked and non-linked quotas are shown in Table 2. If NMFS determines that a shark species

or management group must be closed, then NMFS will publish a notice in the **Federal Register** of closure for that shark species, shark management group, region, and/or sub-region that will be effective no fewer than 4 days from the date of filing for public inspection (§ 635.28(b)(2) and (3)). From the effective date of the notice and time of

the closure, the fisheries for the shark species or management group are closed, even across fishing years, until NMFS announces, via the publication of a notice in the **Federal Register**, that additional quota is available and the season is reopened.

TABLE 2—QUOTA LINKAGES, OPENING DATES, AND COMMERCIAL RETENTION LIMIT BY REGIONAL OR SUB-REGIONAL SHARK MANAGEMENT GROUP

| Region or sub-region   | Management group                                                                                            | Quota linkages                     | Opening dates   | Commercial retention limits for directed shark limited access permit holders (in season adjustments are available)                                                                                                                                                                       |
|------------------------|-------------------------------------------------------------------------------------------------------------|------------------------------------|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Eastern Gulf of Mexico | Blacktip Sharks                                                                                             | Not Linked                         | January 1, 2021 | 45 LCS other than sandbar sharks per vessel per trip.                                                                                                                                                                                                                                    |
|                        | Aggregated Large Coastal Sharks.<br>Hammerhead Sharks.                                                      | Linked.                            |                 |                                                                                                                                                                                                                                                                                          |
| Western Gulf of Mexico | Blacktip Sharks                                                                                             | Not Linked                         | January 1, 2021 | 45 LCS other than sandbar sharks per vessel per trip.                                                                                                                                                                                                                                    |
|                        | Aggregated Large Coastal Sharks.<br>Hammerhead Sharks.                                                      | Linked.                            |                 |                                                                                                                                                                                                                                                                                          |
| Gulf of Mexico         | Non-Blacknose Small Coastal Sharks.                                                                         | Not Linked                         | January 1, 2021 | N/A.                                                                                                                                                                                                                                                                                     |
| Atlantic               | Smoothhound Sharks                                                                                          | Not Linked                         | January 1, 2021 | N/A.                                                                                                                                                                                                                                                                                     |
|                        | Aggregated Large Coastal Sharks.<br>Hammerhead Sharks                                                       | Linked                             | January 1, 2021 | 36 LCS other than sandbar sharks per vessel per trip.<br>If quota is landed quickly (e.g., if approximately 40 percent of the quota is caught at the beginning of the year), NMFS anticipates considering an inseason reduction and later considering an inseason increase. <sup>1</sup> |
|                        | Non-Blacknose Small Coastal Sharks.<br>Blacknose Sharks (South of 34° N lat. only).                         | Linked (South of 34° N lat. only). | January 1, 2021 | N/A.                                                                                                                                                                                                                                                                                     |
|                        | Smoothhound Sharks                                                                                          | Not Linked                         | January 1, 2021 | 8 blacknose sharks per vessel per trip (applies to directed and incidental permit holders).                                                                                                                                                                                              |
| No regional quotas     | Non-Sandbar LCS Research.                                                                                   | Linked                             | January 1, 2021 | N/A.                                                                                                                                                                                                                                                                                     |
|                        | Sandbar Shark Research.<br>Blue Sharks<br>Porbeagle Sharks.<br>Pelagic Sharks Other Than Porbeagle or Blue. | Not Linked                         | January 1, 2021 | N/A.                                                                                                                                                                                                                                                                                     |

<sup>1</sup> This action modifies the percent of quota harvested at which it considers adjusting the retention limit. NMFS will consider adjustment to 40 percent to allow fishermen in the Atlantic region to more fully utilize the quota.

## Classification

The NMFS Assistant Administrator has determined that the final rule is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, and other applicable laws.

Pursuant to 5 U.S.C. 553(d)(3), the NMFS Assistant Administrator has determined that there is good cause to waive the 30-day delay in the date of effectiveness for the adjusted quotas and opening dates for the pelagic shark, shark research, blacknose shark, non-blacknose small coastal shark, and non-sandbar large coastal shark fisheries in the Atlantic and Gulf of Mexico regions, because such a delay is contrary to the public interest.

A delay in the date of effectiveness for this rule would cause negative economic and ecological impacts as

discussed below. Regarding the pelagic shark fishery, a delay in the effectiveness of the quotas in this rule would postpone the start of the 2021 pelagic shark fishery until 30 days after the publication date of this rule. Most pelagic shark species are captured incidentally in swordfish and tuna pelagic longline fisheries that will be open in early January. If the quotas in this rule are not made effective as close to January 1, 2021, as possible, fishermen in those fisheries will have to discard, dead or alive, any pelagic sharks that are caught, while quota is technically available to be used for their retention.

Regarding the shark research fishery, NMFS selects a small number of fishermen to participate in the shark research fishery each year for the purpose of providing NMFS with

biological and catch data to inform stock assessments and effectively manage the Atlantic shark fisheries. All trips in this fishery are monitored with 100 percent observer coverage. Delaying the opening of the shark research fishery would prevent NMFS from maintaining the data for the monthly time-series of wintertime abundance for shark species or collecting vital biological and regional data during this time of year. Not conducting the research trips could limit information available for stock assessments and, thus, NMFS' ability to properly manage the shark fisheries because needed information would not be available for stock assessments, which would be contrary to the public interest.

Regarding the blacknose shark, non-blacknose small coastal shark, and smoothhound shark fisheries, these



fisheries have both a directed component, where fishermen target these shark species, and an incidental component, where fishermen target other species such as Spanish mackerel and bluefish, but may incidentally catch these shark species and potentially land them. The incidental fishery catches small coastal and smoothhound sharks throughout the year. Delaying this action for 30 days would force all fishermen to discard, dead or alive, any small coastal and smoothhound sharks that would be caught before this rule becomes effective. Opening the fishery as close to January 1, 2021, as possible ensures that any mortality associated with landings is counted against the commercial quota in real-time. Additionally, a month-long delay in opening the small coastal shark and smoothhound shark fisheries would occur during the time period when fishermen typically target these shark species, resulting in fishermen experiencing negative economic impacts, which would be contrary to the public interest.

Regarding the non-sandbar large coastal shark fishery in the Atlantic and Gulf of Mexico region, opening on January 1, 2021, would allow south Atlantic fishermen to have a winter fishery and to potentially benefit from a better price per pound, given the geographic distribution of the sharks at this time of year. Delaying the opening of the non-sandbar large coastal shark fishery in the Atlantic and Gulf of Mexico region for an additional 30 days would have negative economic impacts on fishermen because they would not be able to fish for that period. Additionally, many of the primary species targeted in the non-sandbar large coastal shark fisheries are locally available in the southern portion of the Atlantic region in January and a 30-day delay would cause fishermen to miss fishing opportunities, and the associated revenue. Therefore, delaying this action for 30 days is contrary to the public interest.

For the reasons described above, the Assistant Administrator finds good cause to waive the 30-day delay in the date of effectiveness of the quotas and opening dates for the pelagic shark, shark research, blacknose shark, non-blacknose small coastal shark, smoothhound shark, and non-sandbar large coastal shark fisheries in the Atlantic and Gulf of Mexico regions.

These final specifications are exempt from review under Executive Order 12866.

In compliance with section 604 of the Regulatory Flexibility Act (RFA), NMFS prepared a Final Regulatory Flexibility

Analysis (FRFA) for this final rule. The FRFA analyzes the anticipated economic impacts of the final actions and any significant economic impacts on small entities. The FRFA is below.

Section 604(a)(1) of the RFA requires an explanation of the purpose of the rulemaking. The purpose of this final rule is, consistent with the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP and its amendments, to establish the 2021 Atlantic commercial shark adjusted fishing quotas, retention limits, and fishing seasons. Without this rule, the Atlantic commercial shark fisheries would close on December 31, 2020, and would not reopen until appropriate action was taken. While there may be some direct negative economic impacts associated with the opening dates for fishermen in certain northern Atlantic areas, given the geographic distribution and migration patterns of the sharks at this time of year (*i.e.*, they head north before moving south again later in the year), there could also be positive effects for other fishermen in the south Atlantic region. The opening dates were chosen to allow for an equitable distribution of the available quotas among all fishermen across regions and states, to the extent practicable.

Section 604(a)(2) of the RFA requires NMFS to summarize significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis (IRFA), provide a summary of NMFS' assessment of such issues, and provide a statement of any changes made as a result of the comments. The IRFA was completed as part of the proposed rule for the 2021 Atlantic Commercial Shark Season Specifications. NMFS did not receive any comments specific to the IRFA.

Section 604(a)(3) of the RFA requires NMFS to the respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule and provide a detailed statement of any change made to the proposed rule as a result of the comments. NMFS did not receive any comments from the Chief Counsel for Advocacy of the SBA on the proposed rule.

Section 604(a)(4) of the RFA requires NMFS to provide an estimate of the number of small entities to which the rule would apply. The SBA has established size criteria for all major industry sectors in the United States, including fish harvesters. Provision is made under SBA's regulations for an agency to develop its own industry-specific size standards after consultation with SBA and an opportunity for public comment (see 13 CFR 121.903(c)).

Under this provision, NMFS may establish size standards that differ from those established by the SBA Office of Size Standards, but only for use by NMFS and only for the purpose of conducting an analysis of economic effects in fulfillment of the agency's obligations under the RFA. To utilize this provision, NMFS must publish such size standards in the **Federal Register**, which NMFS did on December 29, 2015 (80 FR 81194; 50 CFR 200.2). In that final rule effective on July 1, 2016, NMFS established a small business size standard of \$11 million in annual gross receipts for all businesses in the commercial fishing industry (NAICS 11411) for RFA compliance purposes. NMFS considers all HMS permit holders to be small entities because they had average annual receipts of less than \$11 million for commercial fishing.

As of October 2020, the final rule would apply to the approximately 214 directed commercial shark permit holders, 256 incidental commercial shark permit holders, 163 smoothhound shark permit holders, and 93 commercial shark dealers. Not all permit holders are active in the fishery in any given year. Active directed commercial shark permit holders are defined as those with valid permits that landed one shark based on HMS electronic dealer reports. Of the 470 directed and incidental commercial shark permit holders, only 18 permit holders landed sharks in the Gulf of Mexico region and only 74 landed sharks in the Atlantic region. Of the 163 smoothhound shark permit holders, only 65 permit holders landed smoothhound sharks in the Atlantic region and fewer than 4 landed smoothhound sharks in the Gulf of Mexico region. NMFS has determined that the final rule would not likely affect any small governmental jurisdictions.

Section 604(a)(5) of the RFA requires NMFS to describe the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements of the report or record. None of the actions in this final rule would result in additional reporting, recordkeeping, or compliance requirements beyond those already analyzed in the 2006 Consolidated HMS FMP and its amendments.

Section 604(a)(6) of the RFA requires NMFS to describe the steps taken to minimize the economic impact on small entities, consistent with the stated objectives of applicable statutes. This rulemaking does not establish new management measures to be implemented, but rather implements

previously adopted and analyzed measures as adjustments within a range of previously-authorized activities, as specified in the 2006 Consolidated HMS FMP and its amendments and the Environmental Assessment (EA) for the 2011 shark quota specifications rule (75 FR 76302; December 8, 2010). Thus, in this rulemaking, NMFS adjusted certain baseline quotas established and analyzed in the 2006 Consolidated HMS FMP and its amendments by subtracting the underharvest or adding the overharvest, as specified and allowable in existing regulations. Under current regulations (§ 635.27(b)(2)), all shark fisheries close on December 31 of each year, or when NMFS determines that the landings for any shark management group has reached, or is projected to reach, 80 percent of the available overall, regional, and/or sub-regional quota if the fishery's landings are not projected to reach 100 percent of the applicable quota before the end of the season, or when the quota-linked management group is closed. The

fisheries do not open until NMFS takes action, such as this rulemaking, to re-open the fisheries. Thus, not implementing these management measures would negatively affect shark fishermen and related small entities, such as dealers, and also would not provide management flexibility in furtherance of equitable fishing opportunities, to the extent practicable, for commercial shark fishermen in all regions and areas.

Based on the 2019 ex-vessel meat and fin prices (Table 3), fully harvesting the unadjusted 2021 Atlantic shark commercial base quotas could result in total fleet revenues of \$9,997,263. For the Gulf of Mexico blacktip shark management group, NMFS will increase the baseline sub-regional quotas due to the underharvests in 2020. The increase for the western Gulf of Mexico blacktip shark management group could result in a \$241,691 gain in total revenues for fishermen in that sub-region, while the increase for the eastern Gulf of Mexico blacktip shark management group could

result in a \$27,645 gain in total revenues for fishermen in that sub-region. For the Gulf of Mexico and Atlantic smoothhound shark management groups, NMFS will increase the baseline quotas due to the underharvest in 2020. This would cause a potential gain in revenue of \$403,475 for the fleet in the Gulf of Mexico region and a potential gain in revenue of \$1,112,680 for the fleet in the Atlantic region.

All of these changes in gross revenues are similar to the changes in gross revenues analyzed in the 2006 Consolidated HMS FMP and its amendments. The FRFAs for those amendments concluded that the economic impacts on these small entities are expected to be minimal. In the 2006 Consolidated HMS FMP and its amendments and the EA for the 2011 shark quota specifications rule, NMFS stated it would be conducting annual rulemakings and considering the potential economic impacts of adjusting the quotas for under- and overharvests at that time.

TABLE 3—AVERAGE EX-VESSEL PRICES PER lb dw FOR EACH SHARK MANAGEMENT GROUP, 2019

| Region                       | Species                                       | Average ex-vessel meat price | Average ex-vessel fin price |
|------------------------------|-----------------------------------------------|------------------------------|-----------------------------|
| Western Gulf of Mexico ..... | Blacktip Shark .....                          | \$0.70                       | \$9.16                      |
|                              | Aggregated LCS .....                          | 0.73                         | 15.81                       |
|                              | Hammerhead Shark .....                        | 0.52                         | 12.00                       |
| Eastern Gulf of Mexico ..... | Blacktip Shark .....                          | 0.75                         | 8.00                        |
|                              | Aggregated LCS .....                          | 0.56                         | 12.00                       |
|                              | Hammerhead Shark .....                        | 0.50                         | 13.43                       |
| Gulf of Mexico .....         | Non-Blacknose SCS .....                       | 0.59                         | 5.81                        |
|                              | Smoothhound Shark .....                       | 1.06                         | .....                       |
|                              | Aggregated LCS .....                          | 0.99                         | 3.51                        |
| Atlantic .....               | Hammerhead Shark .....                        | 0.46                         | .....                       |
|                              | Non-Blacknose SCS .....                       | 1.02                         | 4.60                        |
|                              | Blacknose Shark .....                         | 1.27                         | .....                       |
| No Region .....              | Smoothhound Shark .....                       | 0.78                         | 1.68                        |
|                              | Shark Research Fishery (Aggregated LCS) ..... | 0.86                         | 15.15                       |
|                              | Shark Research Fishery (Sandbar only) .....   | 0.68                         | .....                       |
|                              | Blue shark .....                              | .....                        | .....                       |
|                              | Porbeagle shark .....                         | 0.36                         | 2.51                        |
|                              | Other Pelagic sharks .....                    | 1.35                         | 7.60                        |

For this final rule, NMFS reviewed the “opening commercial fishing season” criteria at § 635.27(b)(3)(i) through (vii) to determine when opening each fishery will provide equitable opportunities for fishermen, to the extent practicable, while also considering the ecological needs of the different species. The 2020 fishing year and previous years’ over- and/or underharvests were examined for the different species/complexes to determine the effects of the 2021 final quotas on fishermen across regional fishing areas. NMFS examined season lengths and previous catch rates to

ensure equitable fishing opportunities for fishermen. Lastly, NMFS examined the seasonal variation of the different species/complexes and the effects on fishing opportunities. In addition to these criteria, NMFS also considered updated landings data and public comment on the proposed rule before arriving at the final opening dates for the 2021 Atlantic shark management groups. For the 2021 fishing year, NMFS is opening the shark management groups on January 1, 2021. The direct economic impacts will be neutral on a short- and long-term basis for the Gulf of Mexico blacktip shark, Gulf of

Mexico aggregated LCS, Gulf of Mexico hammerhead shark, Gulf of Mexico non-blacknose shark SCS, Gulf of Mexico and Atlantic smoothhound shark, Atlantic non-blacknose shark SCS, Atlantic blacknose shark, sandbar shark, blue shark, porbeagle shark, and pelagic shark (other than porbeagle or blue sharks) management groups, because NMFS did not change the opening dates of these fisheries from the status quo of January 1.

Opening the aggregated LCS and hammerhead shark management groups in the Atlantic region on January 1 will result in short-term, direct, moderate,

beneficial economic impacts, as fishermen and dealers in the southern portion of the Atlantic region will be able to fish for and sell aggregated LCS and hammerhead sharks starting in January. The opening date finalized in this rule for the Atlantic region has been the same or similar to those since 2016.

Based on past public comments, some Atlantic fishermen in the southern and northern parts of the region prefer a January 1 opening for the fishery as long as the majority of the quota is available later in the year. Along with the inseason retention limit adjustment criteria in § 635.24(a)(8), NMFS monitors the quota through the HMS electronic reporting system on a real-time basis. This allows NMFS the flexibility to further provide equitable fishing opportunities for fishermen across all regions, to the extent practicable. The direct impacts to shark fishermen in the Atlantic region of reducing the retention limit depend on the needed reduction in the retention limit and the timing of such a reduction. Therefore, such a reduction in the retention limit for directed shark limited access permit holders is only anticipated to have minor adverse direct economic impacts to fishermen in the short-term; long-term impacts are not

anticipated as these reductions would not be permanent.

In the northern portion of the Atlantic region, a January 1 opening for the aggregated LCS and hammerhead shark management groups, with inseason trip limit adjustments to ensure quota is available later in the season, will have direct, minor, beneficial economic impacts in the short-term for fishermen as they will potentially have access to the aggregated LCS and hammerhead shark quotas earlier than in past seasons. Fishermen in this area have stated that, depending on the weather, some aggregated LCS species might be available to retain in January. Thus, fishermen will be able to target or retain aggregated LCS while targeting non-blacknose SCS. In addition, opening the aggregated LCS and hammerhead shark management groups in January and using inseason trip limit adjustments to ensure the fishery is open later in the year in 2021 will cause beneficial cumulative economic impacts, because the action allows for a more equitable distribution of the quotas among constituents in this region, consistent with the 2006 Consolidated HMS FMP and its amendments.

This rule does not contain a collection-of-information requirement subject to the Paperwork Reduction Act.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS has prepared a listserv summarizing fishery information and regulations for Atlantic shark fisheries for 2021. This listserv also serves as the small entity compliance guide. Copies of the compliance guide are available from NMFS (see **ADDRESSES**).

**Authority:** 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

Dated: November 24, 2020.

**Samuel D. Rauch III,**  
*Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.*

[FR Doc. 2020–26341 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register

Vol. 85, No. 231

Tuesday, December 1, 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.

## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2641

RIN 3209-AA58

#### Post-Employment Conflict of Interest Restrictions; Revision of Departmental Component Designations

**AGENCY:** Office of Government Ethics.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Government Ethics (OGE) is issuing a proposed rule to revise the component designations of one agency for purposes of the one-year post-employment conflict of interest restriction for senior employees. Specifically, based on the recommendation of the Department of Defense, OGE is proposing to designate one new component to its regulations.

**DATES:** Written comments are invited and must be received on or before December 31, 2020.

**ADDRESSES:** You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA58, by any of the following methods:

*Email:* [usoge@oge.gov](mailto:usoge@oge.gov). Include the reference "Proposed Rule Revising Departmental Component Designations" in the subject line of the message.

*Instructions:* All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209-AA58, for this proposed rulemaking. All comments, including attachments and other supporting materials, will become part of the public record and be subject to public disclosure. OGE may post comments on its website, [www.oge.gov](http://www.oge.gov). Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Kimberly L. Sikora Panza, Associate Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917;

Telephone: (202) 482-9300; TTY: (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

##### I. Substantive Discussion; Addition of New Departmental Component

The Director of OGE (Director) is authorized by 18 U.S.C. 207(h) to designate distinct and separate departmental or agency components in the executive branch for purposes of 18 U.S.C. 207(c), the one-year post-employment conflict of interest restriction for senior employees. Under 18 U.S.C. 207(h)(2), component designations do not apply to persons employed at a rate of pay specified in or fixed according to subchapter II of 5 U.S.C. chapter 53 (the Executive Schedule). Component designations are listed in appendix B to 5 CFR part 2641.

The representational bar of 18 U.S.C. 207(c) usually extends to the whole of any department or agency in which a former senior employee served in any capacity during the year prior to termination from a senior employee position. However, 18 U.S.C. 207(h) provides that whenever the Director determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate component of that department or agency. As a result, a former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated. Likewise, a former senior employee who served in a "parent" department or agency is not barred by 18 U.S.C. 207(c) from making communications to or appearances before any employees of any designated component of that parent, but is barred as to employees of that parent or of other components that have not been separately designated.

The Director regularly reviews the component designations listed in appendix B to part 2641, and in

consultation with the department or agency concerned, makes such additions and deletions as are necessary. Specifically, the Director "shall, by rule, make or revoke a component designation after considering the recommendation of the designated agency ethics official." 5 CFR 2641.302(e)(3). Before designating an agency component as distinct and separate for purposes of 18 U.S.C. 207(c), the Director must find that there exists no potential for use of undue influence or unfair advantage based on past Government service, and that the component is an agency or bureau within a parent agency that exercises functions which are distinct and separate from the functions of the parent agency and from the functions of other components of that parent. 5 CFR 2641.302(c).

Pursuant to the procedures prescribed in 5 CFR 2641.302(e), one agency has forwarded a written request to OGE to amend its listing in appendix B to part 2641. After carefully reviewing the requested change in light of the criteria in 18 U.S.C. 207(h) as implemented in 5 CFR 2641.302(c), OGE is proposing to grant this request and amend appendix B as explained below.

The Department of Defense (DoD) has requested that OGE designate the Defense Advanced Research Projects Agency (DARPA) in appendix B to part 2641 as a separate component of DoD for purposes of 18 U.S.C. 207(c) because it exercises functions that are distinct and separate from the functions of the parent agency and other components. DARPA was created under the statutory authority of the Secretary of Defense in 1958, *see* DoD Directive No. 5105.15 (Feb. 7, 1958), in response to the unforeseen launch of the world's first satellite by the Soviet Union. DARPA "serves as the research and development (R&D) organization in DoD with a primary responsibility of maintaining U.S. technological superiority over our adversaries." *See* DoD Directive 5134.10 (May 7, 2013, as amended Sept. 22, 2017) (outlining DARPA's roles and responsibilities). Directive 5134.10 provides independent authority for DARPA to carry out its uniquely-focused mission using its imagination and innovativeness to project what capabilities the military might want in the future, and sponsor high-risk, high payoff research to deliver

those capabilities. DARPA has special hiring authorities and separate and distinct contracting authorities that help it exercise this mission.

DARPA is a small component, both in absolute terms and in relative terms as compared to the DoD as a whole. DARPA currently has about 220 employees, while the DoD civilian workforce is approximately 750,000 individuals and the entirety of DoD has almost 3 million individuals. Although the Director of DARPA reports to the DoD Undersecretary of Defense for Research and Engineering, the Director of DARPA is delegated broad authority and responsibility to act independently and with minimal supervision in carrying out the organization's mission and directing its research strategy and execution. Directive 5134.10 delegates to the Director of DARPA the fiscal, contracting, and acquisition authority necessary to carry out the organization's responsibilities, as well as authority to communicate directly with other domestic and foreign entities. *See* Directive 5134.10, paragraph 7. DARPA has a separate and distinct budget, and conducts its budgeting process independently of the Office of the Secretary of Defense or any DoD component, including decisions regarding which programs to fund that support the development of breakthrough technologies and capabilities for national security. DARPA's budget independence demonstrates that it does not exercise significant responsibilities that cut across organizational lines within DoD.

According to DoD, designating DARPA as a separate component will not create the potential for undue influence or unfair advantage based on past government service. DARPA independently determines what R&D projects to pursue, and those projects are separate and unique from the rest of DoD and do not cut across organizational lines. Other DoD components do not typically get involved in DARPA's R&D work because the component's mission contemplates developing radically new technologies that do not exist at present and are not known to other DoD components. The typical senior employee who departs DARPA has worked on projects that are entirely outside of and beyond the work of the Office of the Secretary of Defense and other DoD components.

OGE is proposing to grant the request of DoD and amend the agency's listing in appendix B to part 2641 to add DARPA as a new component for purposes of 18 U.S.C. 207(c). DARPA is separate and distinct from its parent organization and other DoD

components, and given the manner in which DARPA works independently from other component agencies and the general management of the DoD, there exists no potential for the use of undue influence or unfair advantage based on past Government service.

As indicated in 5 CFR 2641.302(f), a designation "shall be effective on the date the rule creating the designation is published in the **Federal Register** and shall be effective as to individuals who terminated senior service either before, on or after that date." Initial designations in appendix B to part 2641 were effective as of January 1, 1991. The effective date of subsequent designations is indicated by means of parenthetical entries in appendix B. The new component designation of DARPA made in this proposed rule would be effective on the date the final rule is published in the **Federal Register**.

## II. Matters of Regulatory Procedure

### *Regulatory Flexibility Act*

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects only Federal departments and agencies and current and former Federal employees.

### *Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed rule because it does not contain information collection requirements that require the approval of the Office of Management and Budget.

### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

### *Congressional Review Act*

The proposed rule is not a major rule as defined in 5 U.S.C. chapter 8, Congressional Review of Agency Rulemaking.

### *Executive Orders 13563 and 12866*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory

approaches that maximize net benefits (including 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. In promulgating this proposed rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in Executive Orders 12866 and 13563. This proposed rule has not been reviewed by the Office of Management and Budget under Executive Order 12866 because it is not a "significant" regulatory action for the purposes of that order.

### *Executive Order 12988*

As Director of the Office of Government Ethics, I have reviewed this proposed rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

### **List of Subjects in 5 CFR Part 2641**

Conflict of interests, Government employees.

Approved: November 17, 2020.

### **Emory Rounds,**

*Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend 5 CFR part 2641, as set forth below:

## **PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS**

■ 1. The authority citation for part 2641 continues to read as follows:

**Authority:** 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 2. Amend appendix B to part 2641 by adding the listings for the Department of Defense to read as follows:

### **Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)**

\* \* \* \* \*

*Parent: Department of Defense*

#### **Components**

Defense Advanced Research Projects Agency (DARPA) (EFFECTIVE UPON PUBLICATION OF THE FINAL RULE IN THE **Federal Register**).

Department of the Air Force.

Department of the Army.

Department of the Navy.

Defense Information Systems Agency.  
 Defense Intelligence Agency.  
 Defense Logistics Agency.  
 Defense Threat Reduction Agency  
 (effective February 5, 1999).

National Geospatial-Intelligence  
 Agency (formerly National Imagery and  
 Mapping Agency) (effective May 16,  
 1997).

National Reconnaissance Office  
 (effective January 30, 2003).

National Security Agency.

\* \* \* \* \*

[FR Doc. 2020-25750 Filed 11-30-20; 8:45 am]

BILLING CODE 6345-03-P

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 103 and 235

[Docket No. USCBP-2020-0035]

RIN 1651-AB34

#### Harmonization of the Fees and Application Procedures for the Global Entry and SENTRI Programs and Other Changes

**AGENCY:** U.S. Customs and Border  
Protection, Department of Homeland  
Security.

**ACTION:** Notice of proposed rulemaking;  
correction; re-opening of comment  
period.

**SUMMARY:** U.S. Customs and Border  
Protection (CBP) published a notice of  
proposed rulemaking (NPRM) in the  
**Federal Register** of September 9, 2020,  
concerning harmonization of the fees for  
the Global Entry and SENTRI trusted  
traveler programs as well as other  
changes to those programs. An incorrect  
Regulation Identifier Number (RIN) was  
inadvertently listed in the heading of  
that document. This document corrects  
the September 9, 2020 document to  
reflect that the correct RIN is 1651-  
AB34 as set forth above. Additionally,  
CBP included a summary of the *CBP  
Trusted Traveler Programs Fee Study*  
(Fee Study) in the NPRM and stated that  
the full Fee Study was included in the  
docket of the rulemaking. CBP  
inadvertently failed to post the Fee  
Study on the docket when the NPRM  
was published. Therefore, CBP is  
notifying the public that the Fee Study  
has now been posted in the docket and  
that CBP is re-opening the comment  
period and requesting comments on the  
stand-alone Fee Study.

**DATES:** Comments must be received on  
or before December 31, 2020.

**FOR FURTHER INFORMATION CONTACT:**  
Charity McKenzie Shick, Regulations

and Rulings, Office of International  
Trade, [charity.m.shick@cbp.dhs.gov](mailto:charity.m.shick@cbp.dhs.gov).

**ADDRESSES:** Comments may be  
submitted, identified by docket number  
USCBP-2020-0035, by the following  
method:

■ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the  
instructions for submitting comments.

Due to COVID-19-related restrictions,  
CBP has temporarily suspended its  
ability to receive public comments by  
mail.

*Instructions:* All submissions received  
must include the agency name and  
docket title for this rulemaking, and  
must reference docket number USCBP-  
2020-0035. All comments received will  
be posted without change to <http://www.regulations.gov>, including any  
personal information provided. For  
detailed instructions on submitting  
comments and additional information  
on the rulemaking process, see the  
“Public Participation” heading of the  
**SUPPLEMENTARY INFORMATION** section of  
this document.

*Docket:* For access to the docket to  
read background documents or  
comments received, go to: <https://www.regulations.gov>. Due to relevant  
COVID-19-related restrictions, CBP has  
temporarily suspended its on-site public  
inspection of submitted comments.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Participation**

Interested persons are invited to  
participate in this rulemaking by  
submitting written data, views, or  
arguments on the Fee Study. Only  
comments on the Fee Study will be  
considered. Comments that will provide  
the most assistance to CBP will  
reference a specific portion of the Fee  
Study, explain the reason for any  
recommended change, and include data,  
information, or authority that support  
such recommended change.

##### **Background**

CBP operates several voluntary  
trusted traveler programs at land, sea  
and air ports of entry into the United  
States that allow certain pre-approved  
travelers dedicated processing into the  
United States, including the Secure  
Electronic Network for Travelers Rapid  
Inspection (SENTRI) program, the  
Global Entry program, and the NEXUS  
program. As part of an effort to  
harmonize the fees and application  
procedures for these programs, CBP  
published a notice of proposed  
rulemaking (NPRM) titled  
“Harmonization of the Fees and  
Application Procedures for the Global  
Entry and SENTRI Programs and Other

Changes” in the **Federal Register** (85 FR  
55597) on September 9, 2020. The  
NPRM proposes to change the Global  
Entry and SENTRI application fees to a  
uniform amount, provide a uniform  
standard regarding the payment of the  
Global Entry and SENTRI application  
fees for minors, change the fee payment  
schedule and certain aspects of the  
application process for the SENTRI  
program, and incorporate the SENTRI  
program into the Department of  
Homeland Security (DHS) regulations.  
CBP will be issuing a separate **Federal  
Register** notice regarding changes to the  
NEXUS fee.

##### *Fee Study*

As part of the development of the  
NPRM, CBP performed a fee study  
entitled *CBP Trusted Traveler Programs  
Fee Study* (Fee Study) to determine the  
amount of the fee that is necessary to  
recover the costs associated with  
application processing for the Global  
Entry, SENTRI, and NEXUS programs.  
In the NPRM and Fee Study, CBP  
concluded that a uniform \$120 fee is  
appropriate and necessary to recover a  
reasonable portion of costs associated  
with application processing for these  
three CBP trusted traveler programs.  
The NPRM summarizes the Fee Study,  
seeks comments on its conclusion, and  
states that the full Fee Study can be  
found in the docket of the rulemaking.  
However, CBP inadvertently failed to  
post the Fee Study to the docket at the  
time the NPRM was published. CBP has  
now posted the Fee Study to the docket  
at <https://www.regulations.gov> under  
docket number USCBP-2020-0035 and  
is re-opening the comment period to  
allow for comments to be submitted on  
that Fee Study. Comments must be  
received on or before December 31,  
2020. CBP will not accept comments on  
any topic other than the Fee Study.

##### **Correction of RIN**

In the NPRM document, FR Doc.  
2020-16369, beginning on page 55597  
in the issue of September 9, 2020 (85 FR  
55597), make the following correction in  
the first column:

Remove in the heading of the  
document “RIN 1651-AB94” and add in  
its place “RIN 1651-AB34.”

**Alice A. Kipel,**

*Executive Director, Regulations and Rulings  
Office of Trade, U.S. Customs and Border  
Protection.*

[FR Doc. 2020-26275 Filed 11-30-20; 8:45 am]

BILLING CODE 9111-14-P

## DEPARTMENT OF ENERGY

## 10 CFR Part 430

[EERE-2019-BT-STD-0002]

RIN 1904-AE31

**Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notification of proposed determination and request for comment.

**SUMMARY:** The Energy Policy and Conservation Act, as amended (EPCA), prescribes energy conservation standards for various consumer products, including direct heating equipment (DHE). EPCA also requires the U.S. Department of Energy (DOE) to periodically determine whether more-stringent, amended standards would be technologically feasible and economically justified, and would result in significant energy savings. After carefully considering the available market and technical information for these products, DOE has tentatively concluded in this document that more-stringent standards for DHE would not save a significant amount of energy. Further, depending on the product class, more-stringent standards for DHE would not be technologically feasible or economically justified. As such, DOE has tentatively determined that amended energy conservation standards are not needed. DOE requests comment on this proposed determination, as well as the associated analyses and results.

**DATES:**

**Meeting:** DOE will hold a webinar on Monday, January 25, 2021, from 12:00 p.m. to 4:00 p.m. See section V, “Public Participation,” for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

**Comments:** Written comments and information are requested and will be accepted on or before February 16, 2021.

**ADDRESSES:** Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE-2019-BT-STD-0002, by any of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
2. *Email:* [DHE2019STD0002@ee.doe.gov](mailto:DHE2019STD0002@ee.doe.gov). Include the docket number

EERE-2019-BT-STD-0002 in the subject line of the message.

3. *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (202) 287-1445. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287-1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on this process, see section V (Public Participation) of this document.

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

The docket web page can be found at <https://www.regulations.gov/document?D=EERE-2019-BT-STD-0002>. The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V, “Public Participation,” for further information on how to submit comments through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Dr. Stephanie Johnson, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (202) 287-1943. Email: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (202) 586-5827. Email: [Eric.Stas@hq.doe.gov](mailto:Eric.Stas@hq.doe.gov).

For further information on how to submit a comment or review other

public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287-1445 or by email:

[ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

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## I. Synopsis of the Proposed Determination

Title III, Part B<sup>1</sup> of the Energy Policy and Conservation Act, as amended (EPCA or the Act),<sup>2</sup> established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include direct heating equipment, the subject of this notification of proposed determination (NOPD). (42 U.S.C. 6292(a)(9))

DOE is issuing this NOPD pursuant to the statutory requirement in EPCA that not later than three years after issuance of a final determination not to amend standards, DOE must publish either a notification of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking (NPR) including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B))

“Direct heating equipment” is defined at 10 Code of Federal Regulations (CFR) 430.2 as vented home heating equipment and unvented home heating equipment (*i.e.*, “vented heaters” and “unvented heaters,” respectively). These latter terms are also defined at 10 CFR 430.2. Federal energy conservation standards at 10 CFR 430.32(i) currently exist for vented home heating equipment, but there are currently no standards for unvented home heating equipment.

For this proposed determination, DOE evaluated whether energy conservation standards should be proposed for unvented heaters. In addition, DOE analyzed vented heaters subject to the standards specified in 10 CFR 430.32(i).

For unvented home heating equipment, DOE has previously determined that unvented heaters have

minimal potential for energy savings, as they are installed within a conditioned space and all waste heat will be transferred to the conditioned space. 75 FR 20112, 20130 (April 16, 2010). Further, the test procedure only includes test methods for annual energy consumption for primary electric heaters and rated output for all unvented heaters and does not include a test method or metric for energy efficiency. *See* 10 CFR part 430 subpart B appendix G.

For vented home heating equipment, DOE analyzed the current vented heater market and compared it to the market during the previous rulemakings. DOE found the market has shrunk since these previous rulemakings but that the available technology options and efficiency levels have not changed significantly. In those earlier rulemakings, DOE found that while some efficiency levels were technologically feasible, they were not economically justified. DOE also examined the energy use of the vented heaters considered in the previous rulemakings.

Based on the results of these analyses, as summarized and explained in section III of this document, DOE has tentatively determined that energy conservation standards for unvented heaters are not warranted due to insignificant potential energy savings. Similarly, DOE has tentatively determined that amended energy conservation standards for vented heaters are not warranted due to insignificant energy savings, and furthermore, depending on the product class, more-stringent standards for vented heaters would not be technologically feasible or economically justified. Consequently, DOE proposes to take no further action vis-à-vis the energy conservation standards for DHE at this time.

## II. Authority and Background

The following section briefly discusses the statutory authority underlying this proposed determination, as well as some of the historical background relevant to the establishment of energy conservation standards for unvented home heating equipment and vented home heating equipment.

### A. Authority

EPCA, Public Law 94–163 (42 U.S.C. 6291–6317, as codified), among other things, authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, part B of EPCA established the Energy

Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. The National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA to include DHE in the list of covered products and prescribed the initial energy conservation standards for DHE. (42 U.S.C. 6292(a)(9); 42 U.S.C. 6295(e)(3)) NAECA amendments to EPCA also directed DOE to conduct two cycles of rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(e)(4))

Under EPCA, DOE’s energy conservation program for covered products consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of the Act specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 42 U.S.C. 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The currently applicable DOE test procedures for unvented home heating equipment and vented home heating equipment, subsets of DHE, appear at 10 CFR part 430, subpart B, appendix G (Appendix G) and appendix O (Appendix O), respectively.

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with

<sup>1</sup> For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

<sup>2</sup> 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).



the procedures set forth under 42 U.S.C. 6297(d).

As noted previously, NAECA amended EPCA to include the initial energy conservation standards for DHE—limited to gas DHE only—which were based on annual fuel utilization efficiency (AFUE). NAECA established

separate standards for “wall fan type,” “wall gravity type,” “floor,” and “room” DHE, further divided by input capacity.<sup>3</sup> (42 U.S.C. 6295(e)(3)) The statutory energy conservation standards for gas DHE were incorporated into the CFR in a final rule published on February 7, 1989 (February 1989 final

rule) and applied to all gas vented home heating equipment manufactured beginning January 1, 1990. 54 FR 6062, 6077. The initial statutory energy conservation standards published in the February 1989 final rule are presented in Table II.1 of this document.

TABLE II.1—MINIMUM FEDERAL ENERGY CONSERVATION STANDARDS FOR GAS DIRECT HEATING EQUIPMENT ESTABLISHED BY NAECA

| DHE type    | Heat circulation type | Input rate, Btu/h         | AFUE, percent |
|-------------|-----------------------|---------------------------|---------------|
| Wall .....  | Fan Type .....        | ≤42,000 .....             | 73            |
|             |                       | >42,000 .....             | 74            |
|             | Gravity Type .....    | ≤10,000 .....             | 59            |
|             |                       | >10,000 and ≤12,000 ..... | 60            |
|             |                       | >12,000 and ≤15,000 ..... | 61            |
|             |                       | >15,000 and ≤19,000 ..... | 62            |
|             |                       | >19,000 and ≤27,000 ..... | 63            |
|             |                       | >27,000 and ≤46,000 ..... | 64            |
|             |                       | >46,000 .....             | 65            |
|             |                       |                           |               |
| Floor ..... | All .....             | ≤37,000 .....             | 56            |
| Room .....  | All .....             | >37,000 .....             | 57            |
|             |                       | ≤18,000 .....             | 57            |
|             |                       | >18,000 and ≤20,000 ..... | 58            |
|             |                       | >20,000 and ≤27,000 ..... | 63            |
|             |                       | >27,000 and ≤46,000 ..... | 64            |
|             |                       | >46,000 .....             | 65            |

Pursuant to the amendments to EPCA contained in the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) In this analysis, DOE considers such energy use in its determination of whether energy conservation standards need to be adopted or amended.

EPCA also requires under 42 U.S.C. 6295(m), that DOE must periodically review its already established energy conservation standards for a covered product no later than six years from the issuance of a final rule establishing or amending a standard for a covered product. This six-year-lookback provision requires that DOE publish either a determination that standards do not need to be amended or a NOPR,

including new proposed standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) EPCA further provides that, not later than three years after the issuance of a final determination not to amend standards, DOE must publish either a notification of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B)) DOE must make the analysis on which the determination is based publicly available and provide an opportunity for written comment. (42 U.S.C. 6295(m)(2))

A determination that amended standards are not needed must be based on consideration of whether amended standards will result in significant conservation of energy, are technologically feasible, and are cost-effective. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) Additionally, any new or amended energy conservation standard prescribed by the Secretary for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Among the factors DOE

considers in evaluating whether a proposed standard level is economically justified includes whether the proposed standard at that level is cost-effective, as defined under 42 U.S.C.

6295(o)(2)(B)(i)(II). Under 42 U.S.C. 6295(o)(2)(B)(i)(II), an evaluation of cost-effectiveness requires DOE to consider savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard. (42 U.S.C. 6295(n)(2) and 42 U.S.C. 6295(o)(2)(B)(i)(II))

A NOPR including new proposed standards, must be based on the criteria established under 42 U.S.C. 6295(o). (42 U.S.C. 6295(m)(1)(B)) The criteria in 42 U.S.C. 6295(o) require that standards be designed to achieve the maximum improvement in energy efficiency, which the Secretary determines is technologically feasible and economically justified, and they must result in significant conservation of energy. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) In deciding whether a proposed standard is economically justified, DOE must determine, after receiving public comment, whether the benefits of the

<sup>3</sup> DOE defines “direct heating equipment” as vented home heating equipment and unvented home heating equipment. 10 CFR 430.2. For the

purpose of the energy conservation standards, DOE further delineates vented home heating equipment as “gas wall fan type,” “gas wall gravity type,” “gas

floor,” and “gas room,” and then further divides product classes by input capacity. 10 CFR 430.32(i).

standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (Secretary) considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

DOE is publishing this NOPD in satisfaction of the three-year review requirement in EPCA.

#### B. Rulemaking History

As noted, DOE codified the statutory standards for gas DHE into the CFR in the February 1989 final rule. 54 FR 6062 (Feb. 7, 1989). Pursuant to the requirements in EPCA (42 U.S.C. 6295(e)(4)), DOE conducted two cycles of rulemaking for DHE to determine whether to amend these standards. DOE published a final rule concluding the first round of rulemaking on April 16,

2010 (75 FR 20112 (April 2010 final rule)), and the Department published a final rule concluding the second round on October 17, 2016 (81 FR 71325 (October 2016 final determination)).

#### 1. Current Standards

In the April 2010 final rule, DOE prescribed the current energy conservation standards for gas vented home heating equipment manufactured on and after April 16, 2013. 75 FR 20112, 20234–20235 (April 16, 2010). These standards consolidated the input rate ranges of all gas wall gravity type vented heaters at or below 27,000 Btu/h, consolidated the input rate ranges of all gas room vented heaters at or below 20,000 Btu/h, and are set forth in DOE's regulations at 10 CFR 430.32(i)(2) and repeated in Table II.2 of this document. There are currently no standards for unvented home heating equipment.

TABLE II.2—FEDERAL ENERGY CONSERVATION STANDARDS FOR GAS VENTED HOME HEATING EQUIPMENT

| DHE type    | Heat circulation type | Input rate, Btu/h         | AFUE, percent |
|-------------|-----------------------|---------------------------|---------------|
| Wall .....  | Fan Type .....        | ≤42,000 .....             | 75            |
|             |                       | >42,000 .....             | 76            |
|             | Gravity Type .....    | ≤27,000 .....             | 65            |
|             |                       | >27,000 and ≤46,000 ..... | 66            |
| Floor ..... | All .....             | >46,000 .....             | 67            |
|             |                       | ≤37,000 .....             | 57            |
|             |                       | >37,000 .....             | 58            |
| Room .....  | All .....             | ≤20,000 .....             | 61            |
|             |                       | >20,000 and ≤27,000 ..... | 66            |
|             |                       | >27,000 and ≤46,000 ..... | 67            |
|             |                       | >46,000 .....             | 68            |

## 2. April 2010 Final Rule

### a. Unvented Heaters

DOE did not adopt standards for unvented heaters in the April 2010 final rule, having determined that a standard would produce little energy savings (largely due to the fact that any heat losses are dissipated directly into the conditioned space) and because of limitations in the applicable DOE test procedure. 75 FR 20112, 20130 (April 16, 2010). The unvented heaters test procedure, Appendix G, includes neither a method for measuring energy efficiency nor a descriptor for representing the efficiency of unvented heaters. Instead, Appendix G provides a method to measure and calculate the rated output for all unvented heaters and annual energy consumption of primary electric unvented heaters.

### b. Vented Heaters

DOE established the current energy conservation standards for vented heaters in the April 2010 final rule, but

the agency determined that standards more stringent than those adopted would not be economically justified. 75 FR 20112, 20217–20219 (April 16, 2010). At the next highest level of stringency, trial standard level (TSL) 3, DOE projected the fraction of consumers experiencing an increased life-cycle cost would be 19 percent for gas wall fan type vented heaters, 33 percent for gas wall gravity type vented heaters, 25 percent for gas floor vented heaters, and 20 percent for gas room vented heaters. *Id.* at 75 FR 20218. DOE also projected a decrease in the industry net present value (INPV) of 42.4 percent, with total conversion costs (costs for redesigning and retooling product lines not already meeting the amended standards) of roughly half of the industry value. *Id.* DOE also found that the industry had consolidated significantly over the prior decade due to a steady decline in shipments; the three competitors that account for nearly 100 percent of the market had survived up to that point by consolidating a variety of legacy brands

and products and providing them in replacement situations; and thus, each of the three competitors, two of which are small business manufacturers, would face the prospect of significantly upgrading several low-volume product lines. *Id.* DOE found that for the most part, manufacturers did not have significant volume over which to spread the capital conversion costs required by TSL 3 and all higher TSLs, meaning that margins will likely be pressured unless consumers accept large increases in product price. *Id.* DOE projected even more harmful impacts for small business (e.g., the typical small business manufacturer in the industry would require investment equal to 426 percent of its annual earnings before interest and taxes). *Id.* Concern with the potential impacts on competition and small business were also raised by the U.S. Department of Justice, Antitrust Division based on its review of the evaluated TSLs. *Id.* at 75 FR 20235–20236.

In the April 2010 final rule, DOE concluded that at the next higher level of stringency over that which was adopted, the benefits of energy savings, emission reductions, and consumer net present value (NPV) benefits would be outweighed by the economic burden on some consumers, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers of vented heaters, and the potential for small business manufacturers of vented heaters to reduce their product offerings or to be forced to exit the market completely, thereby reducing competition in the vented heater market. *Id.* at 75 FR 20218–20219.

Compliance with the adopted standards (*i.e.*, those currently at 10 CFR 430.32(i)(2)) was required for all vented home heating equipment manufactured beginning April 16, 2013.

### 3. October 2016 Final Determination

#### a. Unvented Heaters

In the October 2016 final determination, DOE concluded that energy conservation standards for unvented heaters would result in negligible energy savings. 81 FR 71325, 71327 (Oct. 17, 2016). DOE also explained that the test procedure for unvented heaters in Appendix G, includes a calculation of annual energy consumption based on a single assignment of active mode hours for unvented heaters that are used as the primary heating source for the home. *Id.* at 81 FR 71328. For unvented heaters that are not used as the primary heating source for the home, there are no provisions for calculating either the energy efficiency or annual energy consumption. *Id.* DOE further explained that pursuant to 42 U.S.C. 6295(o)(3), DOE is prohibited from prescribing a new or amended standard for a covered consumer product if a test procedure has not been prescribed for that consumer product, and as such, DOE could not consider standards for these products at that time. *Id.*

#### b. Vented Heaters

In the October 2016 final determination, DOE found that few changes to the industry and product offerings had occurred since the April 2010 final rule, and, therefore, the conclusions presented in that final rule were still valid. 81 FR 71325, 71327–71328 (Oct. 17, 2016). For the October 2016 final determination, DOE reviewed the vented heater market, including product literature and product listings in the DOE Compliance Certification Management System (CCMS) database

and the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) product directory.<sup>4</sup> *Id.* at 81 FR 71327. DOE found that the number of models offered in each of the vented heater product classes had decreased overall since the April 2010 final rule, and the agency concluded that this finding supported the notion that the vented heater market was shrinking and that product lines were mainly maintained as replacements for existing vented heater units, and that new product lines generally were not being developed. *Id.*

For the October 2016 final determination DOE also examined available technologies used to improve the efficiency of vented heaters. DOE analyzed products on the market at the time through product teardowns and engaged in manufacturer interviews to obtain further information in support of its analysis. 81 FR 71325, 71327 (Oct. 17, 2016). Most of the technology options on the market and evaluated for the October 2016 final determination (*i.e.*, improved heat exchanger, induced draft, electronic ignition, and a two-speed blower for gas wall fan type vented heaters) were those considered as part of the vented heater rulemaking analysis for the April 2010 final rule. *Id.* DOE determined that the technology options available for vented heaters were likely to have limited potential for achieving energy savings.<sup>5</sup> *Id.* Furthermore, DOE concluded that the costs of technology options would likely be similar or higher than in the previous rulemaking analysis due to reduced shipments and, therefore, reduced purchasing power of vented heater manufacturers. *Id.* DOE also evaluated condensing technology for gas wall fan type vented heaters, which had become available after the April 2010 final rule, and, therefore, was not evaluated as part of that rulemaking. *Id.* DOE concluded

that this technology option would not be economically justified when analyzed for the Nation as a whole due to the significant increase in initial product cost for products using this technology and the potential for severe manufacturer impacts due to the necessary capital conversion costs if an energy conservation standard were adopted at this level. *Id.* at 81 FR 71327–71328.

DOE acknowledged that the vented heater industry had seen further consolidation since the April 2010 final rule, with the total number of manufacturers declining from six to four. *Id.* at 81 FR 71328. Furthermore, according to manufacturers,<sup>6</sup> shipments further decreased since the April 2010 final rule, and, therefore, it would be more difficult for manufacturers to recover capital expenditures resulting from increased standards. *Id.* DOE acknowledged that vented heater units continue to be produced primarily as replacements and that the market is small, and expected that shipments would continue to decrease and amended standards would likely accelerate the trend of declining shipments. *Id.* Moreover, DOE anticipated that small business impacts resulting from amended standards could be significant, as two of the four remaining manufacturers subject to vented heater standards were small businesses. *Id.*

DOE concluded in the October 2016 final determination that due to the lack of advancement in the vented heater industry since the April 2010 final rule in terms of product offerings, available technology options and associated costs, and declining shipment volumes, amending the vented heater energy conservation standards would impose a substantial burden on manufacturers of vented heaters, particularly to small manufacturers. 81 FR 71325, 71328 (Oct. 17, 2016). DOE noted that it had rejected higher TSLs for vented heaters in the April 2010 final rule due to significant impacts on industry profitability, risks of accelerated industry consolidation, and the likelihood that small manufacturers would experience disproportionate impacts that could lead them to discontinue product lines or exit the market altogether, and the Department stated that the market and the manufacturers' circumstances at the time were similar to when DOE evaluated amended energy conservation standards for vented heaters for the April 2010 final rule. *Id.* at 81 FR

<sup>4</sup> The AHRI directory for DHE can be found at: <https://www.ahridirectory.org/NewSearch?programId=23&searchTypeId=3> (Last accessed for the October 2016 final determination on July 16, 2015). The DOE CCMS database can be found at: [https://www.regulations.doe.gov/certification-data/CCMS-4-Direct\\_Heating\\_Equipment.html#q=Product\\_Group\\_s%3A%22Direct%20Heating%20Equipment%22](https://www.regulations.doe.gov/certification-data/CCMS-4-Direct_Heating_Equipment.html#q=Product_Group_s%3A%22Direct%20Heating%20Equipment%22) (Last accessed for the October 2016 final determination on July 16, 2015).

<sup>5</sup> DOE noted that for gas room vented heaters with input capacity up to 20,000 Btu/h, the maximum AFUE available on the market increased from 59 percent in 2009 (only one unit at this input capacity was available on the market at that time) to 71 percent in 2015. DOE found that this was due to heat exchanger improvements only because these units do not use electricity. Due to the small input capacity, DOE found that this increase in AFUE (based on heat exchanger improvements relative to input capacity) was not representative of or feasible for the other gas room vented heater product classes.

<sup>6</sup> Information obtained during confidential manufacturer interviews.

71328–71329. Accordingly, DOE concluded that amended energy conservation standards for vented heaters were not economically justified at any level above the current standard levels because benefits of more-stringent standards would not outweigh the burdens, and the Department determined not to amend the vented heater energy conservation standards. *Id.* at 81 FR 71329.

In the October 2016 final determination, DOE also considered whether to establish energy conservation standards for standby mode and off mode electrical energy use, noting that fossil fuel energy use in standby mode and off mode is already included in the AFUE metric and that electric standby mode and off mode energy use is small in comparison to fossil fuel energy use. *Id.* Because the standards for vented heaters were not amended, DOE concluded it was not required under EPCA to adopt amended standards that include standby mode and off mode energy use, and due to the relatively small potential for energy savings, DOE declined to do so. *Id.*

#### 4. February 2019 Request for Information

On February 26, 2019, DOE published a request for information (RFI) (February 2019 RFI) to solicit information from the public to help DOE determine whether amended standards for DHE would result in significant energy savings and whether such standards would be technologically feasible and economically justified. 84 FR 6095.

#### 5. Process Rule

On February 14, 2020, DOE published in the **Federal Register** a final rule which updated the procedures, interpretations, and policies that DOE will follow in the consideration and promulgation of new or revised appliance energy conservation standards and test procedures under EPCA. 85 FR 8626; *see also* 10 CFR part 430, subpart C, appendix A (*i.e.*, “Process Rule”). The Process Rule requires DOE to conduct an early assessment, which includes publishing a notice in the **Federal Register** announcing that DOE is considering a rulemaking proceeding and soliciting the submission of related comments, including data and information on whether DOE should proceed with the rulemaking, including whether any new or amended rule would be cost-effective, economically justified, technologically feasible, or would result in a significant savings of energy. Section 6(a)(1) of the Process Rule. Based on the responses received to the

early assessment and DOE’s own analysis, DOE will then determine whether to proceed with a rulemaking for a new or amended energy conservation standard or an amended test procedure. *Id.* If DOE determines that a new or amended standard would not satisfy all of the applicable statutory criteria, DOE would engage in a notice and comment rulemaking to issue a determination that a new or amended standard is not warranted. *Id.* If DOE receives sufficient information suggesting it could justify a new or amended standard or the information received is inconclusive with regard to the statutory criteria, DOE would undertake the preliminary stages of a rulemaking to issue or amend an energy conservation standard. Section 6(a)(2) of the Process Rule. In those instances where the early assessment either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this, DOE will examine the potential costs and benefits and energy savings potential of a new or amended energy conservation standard. Section 6(a)(3) of the Process Rule.

DOE will first look to the projected energy savings that are likely to result in “significant energy savings,” as required under 42 U.S.C. 6295(o)(3)(B) to ensure that DOE avoids setting a standard that “will not result in significant conservation of energy.”<sup>7</sup> Section 6(b)(1) of the Process Rule. To determine whether energy savings could be significant, the projected energy savings from a potential maximum technologically feasible (max-tech) standard will be evaluated against a threshold of 0.3 quadrillion Btus (quads) of site energy saved over a 30-year period. Section 6(b)(2) of the Process Rule. If the projected max-tech energy savings do not meet or exceed this threshold, those max-tech savings would then be compared to the total energy usage of the covered product to calculate a potential percentage reduction in energy usage. Section 6(b)(3) of the Process Rule. If this comparison does not yield a reduction in site energy use of at least 10 percent over a 30-year period, the analysis will end, and DOE will propose to determine that no significant energy savings would

<sup>7</sup> EPCA defines “energy efficiency” as the ratio of the useful output of services from an article of industrial equipment to the energy use of such article, measured according to the Federal test procedures. (42 U.S.C. 6311(3)) EPCA defines “energy use” as the quantity of energy directly consumed by an article of industrial equipment at the point of use, as measured by the Federal test procedures. (42 U.S.C. 6311(4)) Given this context, DOE relies on site energy as the appropriate metric for evaluating the significance of energy savings.

likely result from setting new or amended standards. Section 6(b)(4) of the Process Rule. If either one of the thresholds is reached, DOE will conduct analyses to ascertain whether a standard can be prescribed that produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and still constitutes significant energy savings at the level determined to be economically justified. Section 6(b)(5) of the Process Rule.

Because this rulemaking was already in progress at the time the revised Process Rule was published, DOE will apply those provisions moving forward (*i.e.*, rather than reinitiating the entire rulemaking process).

#### 6. Gas Industry Petition for Rulemaking

EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. DOE must specify a different standard level for a type or class of product that has the same function or intended use, if DOE determines that products within such group: (A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2)) Related to the establishment of product classes, EPCA provides that the Secretary may not prescribe an amended or new standard for covered products if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary’s finding. (42 U.S.C. 6295(o)(4))

On November 1, 2018, DOE published in the **Federal Register** a notice of petition for rulemaking and request for comment regarding a petition for

rulemaking submitted by Spire, Inc., the National Gas Supply Association, the National Propane Gas Association, the American Public Gas Association, and the American Gas Association (Gas Industry Petition). 83 FR 54883. The petition requested that DOE issue an interpretive rule stating that DOE's proposed energy conservation standards for residential furnaces and commercial water heaters would result in the unavailability of "performance characteristics" within the meaning of the EPCA (*i.e.*, by setting standards which can only be met by condensing combustion technology products/equipment and thereby precluding the distribution in commerce of non-condensing combustion technology products/equipment) and withdraw the proposed energy conservation standards for residential furnaces and commercial water heaters based upon such findings. 83 FR 54883, 54885 (Nov. 1, 2018).

On July 11, 2019, following consideration of the Gas Industry Petition, public comments, and other information received on the petition, DOE published in the **Federal Register** a notice granting in part and denying in part of the petition for rulemaking, a notice of proposed interpretative rule (NOPIR), and request for comment. 84 FR 33011 (July 2019 NOPIR). The July 2019 NOPIR granted the request for an interpretive rule, but denied the petition to withdraw the proposed rules for residential furnaces and commercial water heaters. *Id.* at 84 FR 33021. Specifically, the July 2019 NOPIR proposed to revise DOE's interpretation of EPCA's "features" provision in the context of condensing and non-condensing technology used in residential furnaces, commercial water heating equipment, and similarly situated appliances (where permitted by EPCA). *Id.* at 84 FR 33020. DOE stated that as compared to products that rely on non-condensing technology, products that use condensing technology may result in more complicated/costly installations, require physical changes to a home that impact aesthetics (*e.g.*, by adding new venting into the living space or decreasing closet or other storage space), and may result

in some enhanced level of fuel switching. *Id.* DOE also acknowledged that although energy efficiency improvements may pay for themselves over time, there is a significant increase in first-cost associated with residential furnaces and commercial water heaters using condensing technology, and for consumers with difficult installation situations (*e.g.*, inner-city row houses) there would be the added cost of potentially extensive venting modifications. *Id.*

DOE proposed in the July 2019 NOPIR to interpret the statute to provide that adoption of energy conservation standards that would limit the market to natural gas and/or propane furnaces, water heaters, or similarly situated products/equipment (where permitted by EPCA) that use condensing combustion technology would result in the unavailability of a performance-related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) and 42 U.S.C. 6316(a). 84 FR 33011, 33021 (July 11, 2019).

In the July 2019 NOPIR, DOE initially assumed that if it were to adopt an interpretation consistent with the Gas Industry Petition, it would suffice to set product/equipment classes largely based upon the key distinction of whether an appliance utilizes condensing or non-condensing combustion technology. However, a number of commenters on the proposed interpretive rule suggested that such an approach may not adequately resolve the issue at hand, as presented in the petition. Instead, these commenters suggested that the agency should focus on preservation of Category I venting, or alternatively maintaining compatibility with all types of existing venting (*i.e.*, Categories I, II, III, and IV). In light of these comments, DOE decided to issue a supplemental notice of proposed interpretive rule (where these comments are presented in further detail), which was published in the **Federal Register** on September 24, 2020 (the September 2020 SNOPIR). 85 FR 60090. In that document, DOE tentatively determined to consider a more involved class structure which turns on the maintenance of

compatibility with existing venting categories, and the Department stated that it seeks further information on the potential feasibility, burdens, and other implications of implementing such a venting-compatibility approach. The comment period on the September 2020 SNOPIR was originally scheduled to end on October 26, 2020.

However, on September 25, 2020, and October 6, 2020, DOE received requests from A.O. Smith and Lennox, respectively, seeking an extension of the comment period on the September 2020 SNOPIR. On September 29, 2020, DOE received a request from the submitters of the Gas Industry Petition seeking prompt action on their petition. Balancing these competing requests, DOE published in the **Federal Register** on October 22, 2020 a notice extending the public comment period for submitting comments and data on the SNOPIR to November 9, 2020. 85 FR 67312. DOE will analyze the information received in comments on the September 2020 SNOPIR, and it will consider both potential venting-compatibility approaches, as well as its original proposed approach.

DOE plans to consider the comments received on the July 2019 NOPIR and the September 2020 SNOPIR, after which the Department will determine whether and how to proceed with the interpretive rule in response to the Gas Industry Petition. As necessary, DOE would then consider any required changes to its energy conservation standards for DHE, including product class designations.

### III. General Discussion

DOE developed this proposed determination after a review of the DHE market, including product literature and product listings in the DOE CCMS database and the AHRI product directory. DOE also considered written comments, data, and information from interested parties that represent a variety of interests. In response to the February 2019 RFI, DOE received eight substantive comments from interested parties, which are listed in Table III.1.<sup>8</sup> This notice addresses issues raised by these commenters.

TABLE III.1—INTERESTED PARTIES PROVIDING WRITTEN RESPONSE TO THE FEBRUARY 2019 RFI

| Name(s)                                                                                                                         | Commenter type * | Acronym          |
|---------------------------------------------------------------------------------------------------------------------------------|------------------|------------------|
| Air-conditioning, Heating, and Refrigeration Institute .....                                                                    | TA .....         | AHRI.            |
| Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, and Natural Resources Defense Council. | EA .....         | Joint Advocates. |

<sup>8</sup> DOE also received a comment that was not responsive to the RFI.

TABLE III.1—INTERESTED PARTIES PROVIDING WRITTEN RESPONSE TO THE FEBRUARY 2019 RFI—Continued

| Name(s)                                                                                                                       | Commenter type * | Acronym        |
|-------------------------------------------------------------------------------------------------------------------------------|------------------|----------------|
| Association of Home Appliance Manufacturers .....                                                                             | TA .....         | AHAM.          |
| Institute for Policy Integrity at New York University School of Law .....                                                     | P .....          | PI NYU.        |
| National Grid USA Service Company .....                                                                                       | U .....          | National Grid. |
| National Propane Gas Association .....                                                                                        | U .....          | NPGA.          |
| Northwest Energy Efficiency Alliance .....                                                                                    | EA .....         | NEEA.          |
| Pacific Gas and Electric, Southern California Edison, San Diego Gas and Electric (i.e., California Investor Owned Utilities). | U .....          | CA IOUs.       |

\* EA: Efficiency/Environmental Advocate; P: Policy Advocacy Group, TA: Trade Association; U: Utility or Utility Trade Association.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public docket.<sup>9</sup>

#### A. Product Classes and Scope of Coverage

When evaluating and establishing new or amended energy conservation standards, DOE divides covered products into product classes by the type of energy used or by capacity or other performance-related features that justify differing standards. (42 U.S.C. 6295(q)) In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. *Id.* The scope of coverage is discussed in further detail in section III.A.1 of this document. The product classes for this proposed determination are discussed in further detail in section III.A.2 of this document.

#### 1. Scope of Coverage and Definitions

This NOPD covers those products that meet the definitions of “direct heating equipment,” which is defined as vented home heating equipment and unvented home heating equipment. 10 CFR 430.2. “Home heating equipment, not including furnaces” likewise means vented home heating equipment and unvented home heating equipment. *Id.* The existing energy conservation standards at 10 CFR 430.32(i)(2) apply only to product classes of vented home heating equipment. There are no existing energy conservation standards for unvented home heating equipment.

<sup>9</sup> The parenthetical reference provides a reference for information located in the docket of DOE’s rulemaking to consider amended energy conservation standards for direct heating equipment. (Docket No. EERE–2019–BT–STD–0002, which is maintained at <https://www.regulations.gov/docket?D=EERE-2019-BT-STD-0002>). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

#### a. Unvented Heaters

Unvented heaters are those products that meet the definitions for “unvented home heating equipment,” as codified at 10 CFR 430.2. Under that provision, “Unvented home heating equipment” means a class of home heating equipment, not including furnaces, used for the purpose of furnishing heat to a space proximate to such heater directly from the heater and without duct connections and includes electric heaters and unvented gas and oil heaters. DOE further defines the various sub-types of unvented heaters at 10 CFR 430.2 as follows:

(1) “Baseboard electric heater” means an electric heater which is intended to be recessed in or surface mounted on walls at floor level, which is characterized by long, low physical dimensions, and which transfers heat by natural convection and/or radiation.

(2) “Ceiling electric heater” means an electric heater which is intended to be recessed in, surface mounted on, or hung from a ceiling, and which transfers heat by radiation and/or convection (either natural or forced).

(3) “Electric heater” means an electric appliance in which heat is generated from electrical energy and dissipated by convection and radiation and includes baseboard electric heaters, ceiling electric heaters, floor electric heaters, portable electric heaters, and wall electric heaters.

(4) “Floor electric heater” means an electric heater which is intended to be recessed in a floor, and which transfers heat by radiation and/or convection (either natural or forced).

(5) “Portable electric heater” means an electric heater which is intended to stand unsupported, and can be moved from place to place within a structure. It is connected to electric supply by means of a cord and plug, and transfers heat by radiation and/or convection (either natural or forced).

(6) “Primary heater” means a heating device that is the principal source of heat for a structure and includes baseboard electric heaters, ceiling

electric heaters, and wall electric heaters.

(7) “Supplementary heater” means a heating device that provides heat to a space in addition to that which is supplied by a primary heater. Supplementary heaters include portable electric heaters.

(8) “Unvented gas heater” means an unvented, self-contained, free-standing, non-recessed gas-burning appliance which furnishes warm air by gravity or fan circulation.

(9) “Unvented oil heater” means an unvented, self-contained, free-standing, non-recessed oil-burning appliance which furnishes warm air by gravity or fan circulation.

(10) “Wall electric heater” means an electric heater (excluding baseboard electric heaters) which is intended to be recessed in or surface mounted on walls, which transfers heat by radiation and/or convection (either natural or forced) and which includes forced convectors, natural convectors, radiant heaters, high wall or valance heaters.

DOE received no recommended changes to the unvented heater definitions in response to its request in the February 2019 RFI.

#### b. Vented Heaters

Vented heaters are those products that meet the definitions for “vented home heating equipment,” as codified at 10 CFR 430.2. Under that provision, “vented home heating equipment” or “vented heater” means a class of home heating equipment, not including furnaces, designed to furnish warmed air to the living space of a residence, directly from the device, without duct connections (except that boots not to exceed 10 inches beyond the casing may be permitted) and includes: Vented wall furnace, vented floor furnace, and vented room heater. DOE further defines the various sub-types of vented heaters at 10 CFR 430.2 as follows:

(1) “Vented floor furnace” means a self-contained vented heater suspended from the floor of the space being heated, taking air for combustion from outside this space. The vented floor furnace

supplies heated air circulated by gravity or by a fan directly into the space to be heated through openings in the casing.

(2) “Vented room heater” means a self-contained, free standing, non-recessed, vented heater for furnishing warmed air to the space in which it is installed. The vented room heater supplies heated air circulated by gravity or by a fan directly into the space to be heated through openings in the casing.

(3) “Vented wall furnace” means a self-contained vented heater complete with grilles or the equivalent, designed for incorporation in, or permanent attachment to, a wall of a residence and furnishing heated air circulated by gravity or by a fan directly into the

space to be heated through openings in the casing.

AHRI recommended against revisions or additions to the vented heater definitions, stating that the definitions are appropriate as written and capture the entirety of the market. (AHRI, No. 6 at p. 2) No other comments were received regarding the definitions relevant to vented heaters.

## 2. Product Classes

In general, when evaluating and establishing energy conservation standards, DOE divides the covered product into classes by the type of energy used, the capacity, or other performance-related feature that justifies

a different standard. (42 U.S.C. 6295(q)) In making a determination whether capacity or another performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE deems appropriate. *Id.*

For vented heaters, the current energy conservation standards specified in 10 CFR 430.32(i)(2) are based on 11 product classes divided by equipment type (*i.e.*, gas wall, gas floor, or gas room), heat circulation type (*i.e.*, fan type or gravity type), and input capacity. Table III.2 lists the current product classes for vented heaters.

TABLE III.2—CURRENT VENTED HEATER PRODUCT CLASSES

| DHE type        | Heat circulation type | Input rate, Btu/h                                                    |
|-----------------|-----------------------|----------------------------------------------------------------------|
| Gas Wall .....  | Fan Type .....        | ≤42,000.<br>>42,000.                                                 |
|                 | Gravity Type .....    | ≤27,000.<br>>27,000 and ≤46,000.<br>>46,000.                         |
| Gas Floor ..... | All .....             | ≤37,000.<br>>37,000.                                                 |
| Gas Room .....  | All .....             | ≤20,000.<br>>20,000 and ≤27,000.<br>>27,000 and ≤46,000.<br>>46,000. |

In the February 2019 RFI, DOE requested feedback on whether changes to the current vented heater product classes should be made. AHRI stated that changes to the existing product classes and adding new product classes are not necessary. (AHRI, No. 6 at p. 2) No other comments were received on the DHE product classes.

## B. Analysis for This Notification of Proposed Determination

### 1. Overview of the Analysis

As stated previously, in determining that amended standards are not needed, DOE must consider whether amended standards would result in significant conservation of energy, are technologically feasible, and are cost-effective as described in 42 U.S.C. 6295(o)(2)(B)(i)(II). (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)). An evaluation of cost-effectiveness under 42 U.S.C. 6295(o)(2)(B)(i)(II) requires that DOE consider savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard. (42 U.S.C. 6295(n)(2) and 42 U.S.C.

6295(o)(2)(B)(i)(II)) Before potential energy savings and cost-effectiveness of amended standards can be estimated, available and working prototype technologies with the potential to improve energy efficiency must first be evaluated. Accordingly, DOE generally starts with this technology evaluation.

### a. Technological Feasibility

In evaluating potential amendments to energy conservation standards, DOE first conducts a market and technology assessment to survey the products currently available on the market and identify technology options (including prototype technologies) that could improve the efficiency of the products or equipment that are the subject of the rulemaking. DOE then conducts a screening analysis for the technologies identified, and, as a first step, determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially-available products or in working prototypes to be technologically feasible. 10 CFR part 430, subpart C, appendix A, section 6(c)(3)(i).

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in

light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety, and (4) whether a proprietary technology represents a unique pathway to achieving a certain efficiency level. 10 CFR part 430, subpart C, appendix A, section 6(c)(3)(ii)–(v) The technology options identified for this NOPD are essentially those technologies identified and considered for the October 2016 final determination. *See* sections III.B.3.b and III.B.3.c of this document for additional discussion.

When DOE proposes to adopt an amended standard for a type or class of covered product, as part of its analysis, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such a product. (42 U.S.C. 6295(p)(1)) Accordingly, DOE determined the max-tech improvements in energy efficiency for vented heaters, using the design parameters for the most efficient products available on the market or in working prototypes. *See* section III.B.3.d of this document for further discussion.

## b. Energy Savings

In determining whether amended standards are needed, DOE must consider whether potential standards would result in significant conservation of energy. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) Congress did not define the statutory term “significant conservation of energy.” DOE recently defined a significant energy savings threshold in the Process Rule. 85 FR 8626, 8705 (Feb. 14, 2020). Specifically, DOE prescribed a two-step approach that considers both a quad threshold value (*i.e.*, for site energy savings calculated over a 30-year period) and a percentage threshold value (*i.e.*, for percentage reduction in energy usage) to ascertain whether a potential standard satisfies the requirement of 42 U.S.C. 6295(o)(3)(B) that DOE may not set a standard that “will not result in significant conservation of energy.” *Id.*; see also section 6(b) of the Process Rule. As discussed, if neither threshold is met, the analysis will end, and DOE will propose to determine that no significant energy savings would likely result from setting new or amended standards. Section 6(b)(4) of the Process Rule.

DOE considered the energy use analysis conducted for the April 2010 final rule, the qualitative evaluation of the potential savings in the October 2016 final determination, and input from stakeholders and other sources to evaluate the current potential for significant energy conservation from amended DHE standards.

## c. Cost-Effectiveness

Under EPCA’s six-year-lookback review provision for existing energy conservation standards at 42 U.S.C. 6295(m)(1), cost-effectiveness of potential amended standards is a relevant consideration both where DOE proposes to adopt such standards, as well as where it does not. In making a determination of whether existing energy conservation standards do not need to be amended, EPCA requires DOE to consider the cost-effectiveness of amended standards in the context of the savings in operating costs throughout the estimated average life of the covered product compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(m)(1)(A) (*referencing* 42 U.S.C. 6295(n)(2))) Additionally, any new or amended *energy conservation standard* prescribed by the *Secretary* for any type (or class) of *covered product* shall be designed to achieve the maximum improvement in energy efficiency which

the *Secretary* determines is technologically *feasible* and economically justified. (42 U.S.C. 6295(o)(2)(A)) Cost-effectiveness is one of the factors that DOE must ultimately consider under 42 U.S.C. 6295(o)(2)(B) to support a finding of economic justification, if it is determined that amended standards are appropriate under the applicable statutory criteria. (42 U.S.C. 6295(o)(2)(B)(i)(II))

In determining cost effectiveness of potential amended standards for DHE, DOE considered the life-cycle cost (LCC) and payback period (PBP) analyses that estimate the costs and benefits to users from standards. The LCC is the sum of the initial price of equipment (including its installation) and the operating expense (including energy, maintenance, and repair expenditures) discounted over the lifetime of the equipment. The LCC analysis requires a variety of inputs, such as equipment prices, equipment energy consumption, energy prices, maintenance and repair costs, equipment lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs (*e.g.*, equipment lifetime and discount rate), DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of more-efficient equipment through lower operating costs. DOE calculates the PBP by dividing the change in total installation cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

To further inform DOE’s consideration of the cost-effectiveness of potential amended standards, DOE may also consider the NPV of total costs and benefits estimated as part of the national impact analysis (NIA). The inputs for determining the NPV of the total costs and benefits experienced by consumers are: (1) Total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings.

For the determination proposed in this document, DOE considered the LCC and PBP analyses from the April 2010 final rule, as well as the evaluation in the October 2016 final determination, and information gathered on the current market and technologies.

## d. Further Considerations

As stated previously, pursuant to EPCA, if DOE does not issue a notification of determination that energy

conservation standards for DHE do not need to be amended, DOE must issue a NOPR that includes new proposed standards. (42 U.S.C. 6295(m)(1)(B)) The new proposed standards in any such NOPR must be based on the criteria established under 42 U.S.C. 6295(o). (42 U.S.C. 6295(m)(1)(B)) The criteria in 42 U.S.C. 6295(o) require that standards be designed to achieve the maximum improvement in energy efficiency, which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges for, or maintenance expenses of the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

As discussed in the October 2016 final determination, DOE found that amended standards for vented heaters would not be economically justified under the considerations of the seven factors prescribed in EPCA. 81 FR 71325, 71328–71329 (Oct. 17, 2016). For the determination proposed in this document, DOE has considered the previous evaluation of amended standards in the October 2016 final determination.

## 2. Unvented Heaters

In the February 2019 RFI, DOE specifically sought comment on the definitions for unvented heaters, and generally sought comment on a number



of issues related to DHE (which includes both vented and unvented home heaters). 84 FR 6095, 6098 (Feb. 26, 2019).

CA IOUs suggested that electric infrared heating technology be added to the technology options list. (CA IOUs, No. 9 at p. 1) DOE notes that this particular technology option is relevant to unvented heaters (as electric infrared heaters are not vented). However, for unvented heaters, including electric unvented heaters, any heat losses are lost to the living space in which the unit is installed. As a result, these heaters are nearly 100-percent efficient during the heating season, in that all energy consumed is converted to heat that ends up within the living space as useful heat, and as a result, there is negligible opportunity for energy savings. Therefore, DOE has tentatively determined not to analyze unvented electric heaters further. However, DOE seeks additional input on the operation of electric infrared heaters as compared to other types of electric unvented heaters, and on the comparative levels of energy consumption.

Regarding unvented gas heaters and unvented oil heaters, the Joint Advocates commented in response to the RFI that DOE should consider a standard for unvented heaters that addresses off mode energy consumption. The commenters argued that models with standing pilot lights can waste a significant amount of energy in off mode during the non-heating season. (Joint Advocates, No. 7 at p. 2)

The unvented heater test procedure, Appendix G, has provisions to calculate

the rated output in Btu/h for gas and oil models. Under Appendix G, measurement of the pilot light input rate is not required for unvented heaters where the pilot light is designed to be turned off by the user when the heater is not in use and that include an instruction to turn off the unit is provided on the heater near the gas control value (e.g., by label) by the manufacturer. For unvented heaters with a pilot light that is not designed to be turned off when not in use, or that does not include an instruction to do so, the pilot light input rate is required to be measured, but is not used in the calculation of rated output. DOE reviewed the product literature for unvented gas and oil heaters on the market and found that most models that include a standing pilot light instruct the user on how to turn the pilot light off, and, therefore, would not be required to measure the pilot light consumption under the existing test procedure. As a result, most models are not required to measure the pilot light input rate. DOE will further consider whether to propose amended test procedures for unvented home heating equipment in the ongoing evaluation of the test procedure, including whether to address the measurement of the energy consumption and energy efficiency associated with standing pilot lights.<sup>10</sup>

### 3. Vented Heaters

In the February 2019 RFI, DOE sought comment on a number of issues related to vented heaters, which are discussed

in the subsections within this section. 84 FR 6095, 6098–6106 (Feb. 26, 2019).

#### a. Market Assessment

##### Models on the Market

DOE has conducted a review of the vented heater market, including product literature and product listings in the CCMS database and AHRI product directory. DOE has tentatively concluded that the number of models offered in each of the vented heater product classes has continued to decrease overall since the October 2016 final determination, as shown in Table III.3 of this document. The model counts presented in Table III.3 of this document are counts of individual model numbers, as opposed to basic model numbers. A basic model can have multiple individual model numbers certified under it. The model counts from previous rulemakings were individual model numbers, so for consistency of comparison, the model counts for 2019 that are presented in Table III.3 of this document are also in terms of individual model number. DOE acknowledges that, although changes in model counts and shipments sometimes correlate, changes to available model counts do not necessarily indicate a change in the number of units sold. For example, a model could be taken off of the market, but more units of another model could be sold, thereby resulting in roughly the same amount of sales as before the first model was taken off the market. Shipments of vented heaters are discussed in section III.B.3.g of this document.

TABLE III.3—VENTED HEATER INDIVIDUAL MODEL COUNTS BY PRODUCT CLASS FOR CURRENT AND PREVIOUS RULEMAKINGS

| Product class               | Model count by product class |                                     |                           |
|-----------------------------|------------------------------|-------------------------------------|---------------------------|
|                             | 2019 *                       | October 2016 final determination ** | April 2010 final rule *** |
| Gas Wall Fan Type .....     | 50                           | 64                                  | 82                        |
| Gas Wall Gravity Type ..... | 50                           | 56                                  | 52                        |
| Gas Floor .....             | 10                           | 15                                  | 15                        |
| Gas Room .....              | 19                           | 28                                  | 29                        |

\* CCMS database (last accessed on July 1, 2019), with further information taken from the AHRI Directory (last accessed on July 1, 2019). Models designated as “Production Stopped” within the AHRI Directory are not included in the model count.

\*\* CCMS database (last accessed on July 16, 2015), with further information taken from the AHRI Directory (last accessed on July 16, 2015). Models designated as “Discontinued” within the AHRI Directory are not included in the model count.

\*\*\* Gas Appliance Manufacturers Association (GAMA) Directory for Direct Heating Equipment<sup>11</sup> (downloaded March 2, 2009). Models designated as “Discontinued” within the GAMA Directory are not included in the model count.

<sup>10</sup> DOE published an RFI regarding test procedures for DHE. 84 FR 6088 (Feb. 26, 2019). The docket for the test procedure RFI is available at: <https://www.regulations.gov/docket?D=EERE-2019-BT-TP-0003>.

<sup>11</sup> AHRI is the trade association that represents manufacturers of heating products. It was formed on January 1, 2008, by the merger of GAMA, which formerly represented these manufacturers, and the Air-Conditioning and Refrigeration Institute. As

stated previously, AHRI maintains a Consumers’ Directory of Certified Product Performance for direct heating equipment, which can be found on AHRI’s website at: <https://www.ahridirectory.org/Search/SearchHome?ReturnUrl=%2f>.

In response to the February 2019 RFI, AHRI confirmed that there are fewer models in the AHRI Directory now than there were at the time of the October 2016 final determination. (AHRI, No. 6 at p. 4) In response to the February 2019 RFI, AHAM and AHRI commented generally that the market characteristics have not changed significantly since the analysis was done for the October 2016 final determination. (AHAM, No. 5 at p. 2; AHRI, No. 6 at p.1)

The CA IOUs stated that they reviewed available models from major distributors and catalogs, and they identified the models available in each product class through an online market survey. CA IOUs provided the number of models they identified along with information on the AFUE values available. (CA IOUs, No. 8 at pp. 2–3) The number of models in the gas wall fan type and gravity type vented heater product classes identified by the CA IOUs were different than those identified by DOE from its review of the CCMS database and the AHRI Directory. For the gas wall fan type vented heater product class, CA IOUs stated they identified 64 products, whereas DOE identified 48 models in the CCMS database and 50 models in the AHRI Directory. For the gas wall gravity type vented heater product class, CA IOUs stated they identified 43 products, whereas DOE identified 50 models in the CCMS database and 48 models in the AHRI Directory. For the gas floor vented heater product class, CA IOUs identified 10 products which matched the number of models in the CCMS database and the AHRI Directory. For the gas room vented heater product class, CA IOUs did not provide a number for the identified models but did state that there were a large number available on the market. (CA IOUs, No. 8 at p. 2) DOE identified 19 gas room vented heaters in both the CCMS database and AHRI Directory.

The discrepancies between the gas wall fan type and gas wall gravity type vented heater model counts identified by CA IOUs and the model counts identified by DOE from the CCMS database and AHRI Directory may have arisen from CA IOUs' review of the market through online sources and catalog review where the product class may not have been immediately apparent. The AHRI Directory provides information on the DHE and heat circulation types which are used to identify each model's product class (information which is not publicly available in the CCMS database). The information in the AHRI Directory is provided directly by AHRI-member manufacturers, and as such, products

are classified directly by manufacturers. Similarly, the DOE CCMS database relies on manufacturer submissions. Manufacturers of covered products are required to submit to DOE a certification report certifying that each basic model meets the applicable energy conservation standard(s) before distributing in commerce any basic model. The certification report includes general information such as the manufacturer and model number, and product specific information, which for DHE includes the AFUE rating. Because manufacturers are legally required to submit model information to DOE, the CCMS database should be the most comprehensive listing of models available. Further, both the CCMS and AHRI database may be more accurate than a review of manufacturers' literature, due to manufacturers' familiarity with their products' classifications. The total model count for gas wall fan type and gas wall gravity type vented heaters provided by the CA IOUs is 107, and the total model count for the same models when examining both the CCMS database and AHRI Directory is 100.

Likewise, the AFUE ranges identified by the CA IOUs also do not match the ranges DOE identified based on the CCMS database and AHRI Directory. For gas wall fan type vented heaters with input rates below 42,000 Btu/h, CA IOUs stated that the AFUE range was between 75 and 83 percent, while DOE identified models with AFUE values between 75 and 90 percent. (CA IOUs, No. 8 at pp. 2–3) This suggests that the two condensing models on the market were not a part of CA IOUs' analysis. For gas wall fan type vented heaters with input rates above 42,000 Btu/h, CA IOUs stated that the AFUE range was between 74 and 76 percent and that all the products they reviewed had AFUE values below the minimum energy conservation standard of 76 percent. (CA IOUs, No. 8 at pp. 2–3) DOE found that the models identified by the CA IOUs as gas wall fan type vented heaters with AFUE below 76 percent were gas wall gravity type vented heaters and listed in the CCMS database with AFUE values which meet the minimum energy conservation standards for the gas wall gravity type classes. For gas wall gravity type vented heaters with input rates less than or equal to 27,000 Btu/h, greater than 27,000 Btu/h and less than or equal to 46,000 Btu/h, and greater than 46,000 Btu/h, the AFUE ranges identified by CA IOUs were 65 to 76 percent, 65 to 76 percent, and 69 to 71 percent, respectively. (CA IOUs, No. 8 at pp. 2–3) DOE identified the AFUE ranges for

the given input capacities as 65 to 72 percent, 66 to 70 percent, and 67 to 70 percent, respectively. The minimum energy conservation standard for the three gas wall gravity type vented heater input rate ranges, from lowest to highest input rate, are 65, 66, and 67 percent, respectively. For gas wall gravity type vented heaters with input rates greater than 27,000 Btu/h and less than or equal to 46,000 Btu/h, the minimum AFUE in the CA IOUs identified range (65 percent) is less than the minimum energy conservation standard (66 percent), suggesting that at least one model was misidentified.

For gas wall gravity type vented heaters with input rates greater than 46,000 Btu/h, the minimum AFUE identified by CA IOUs (69 percent) is above the minimum energy conservation standard (67 percent), suggesting that not all models in this input rate range were identified. For gas floor vented heaters, CA IOUs identified an AFUE range between 57 and 70 percent across all input rate ranges. (CA IOUs, No. 8 at pp. 2–3) However, all gas floor vented heaters identified by DOE have AFUE values at the minimum energy conservation standard. The minimum energy conservation standards gas floor vented heaters with input rates less than or equal to 37,000 Btu/h and greater than 37,000 Btu/h are 57 and 58 percent, respectively. The CA IOUs provided links to their 10 identified gas floor vented heaters, and the model numbers matched those identified by DOE which have AFUE values at the minimum energy conservation standard. (CA IOUs, No. 8 at pp. 2–3) Further, none of the sources CA IOUs provided included any efficiency or AFUE information. Due to various discrepancies DOE has identified in the model count and AFUE ranges provided by CA IOUs, DOE has tentatively decided to continue to use the models and AFUE values found within the CCMS database and AHRI Directory.

#### Manufacturers

The number of manufacturers producing vented heaters increased in the CCMS database from four to five since the October 2016 final determination. This new manufacturer mainly produces hearth products (which are not subject to this proposed determination) but has added two gas wall gravity type vented heaters with input rate and AFUE values that are comparable to the input rate and AFUE values of other models available on the market, and that are similar in design. AHRI stated that there are six AHRI member manufacturers in the DHE

industry. (AHRI, No. 6 at p. 5) Upon review two of the six manufacturers identified by AHRI were not identified by DOE as manufacturers of vented heaters. Rather, DOE found that the two additional AHRI manufacturers produce hearth products, which as noted previously are not a subject of this rulemaking. The new manufacturer identified by DOE is not an AHRI member manufacturer and, consequently, was not identified by AHRI.

#### b. Technology Options for Efficiency Improvement

In the February 2019 RFI, DOE listed the technology options considered in the previous rulemakings to increase AFUE and requested comment on these options and any other technology options that would be relevant to vented heaters. 84 FR 6095, 6099 (Feb. 26, 2019). Specifically, DOE identified the technologies in the following Table III.4 for improving the efficiency of vented heaters.

TABLE III.4—TECHNOLOGY OPTIONS FOR VENTED HEATERS

| Technology options                       |
|------------------------------------------|
| Increased heat exchanger surface area.   |
| Multiple flues.                          |
| Multiple turns in flue.                  |
| Direct vent (concentric).                |
| Increased heat transfer coefficient.     |
| Electronic ignition.                     |
| Thermal vent damper.                     |
| Electrical vent damper.                  |
| Power burner.                            |
| Induced draft.                           |
| Two-stage and modulating operation.      |
| Improved fan or blower motor efficiency. |
| Increased insulation.                    |
| Condensing.                              |
| Condensing Pulse Combustion.             |
| Air circulation fan.                     |
| Sealed combustion.                       |

AHAM commented that technologies available for improving efficiency have not advanced significantly since the October 2016 final determination. (AHAM, No. 5 at p. 2) AHRI further stated that the use of the technologies that DOE identified are generally not economically justifiable, that consumers will purchase other types of heating appliances (*e.g.*, not DHE) before purchasing vented heaters with those technologies, and that other technology

options should not be considered in the analysis. In addition, AHRI stated that the inclusion of electronic ignition can minimize the utility of vented heaters. (AHRI, No. 6 at p. 3)

During DOE's examination of the current vented heater market, DOE found that the available range of input rates and AFUE values of products available on the market have stayed largely the same since the October 2016 final determination. Differences in the available input rate and AFUE were mostly due to models being taken off the market as opposed to new models being added. This indicates that the technology options currently available are similar to those examined in both the April 2010 final rule and October 2016 final determination. DOE did not identify any additional technologies, and there were not any comments suggesting additional technology options for vented heaters that were not previously considered. Therefore, DOE used the technology options in Table III.4 of this document for its review of potential amended vented heater energy conservation standard levels in this document.

#### c. Screening Analysis

In the February 2019 RFI, DOE identified and explained why four of the technologies on its initial list had been previously screened out: (1) Increased heat transfer coefficient (practicability to manufacture, install, and service); (2) power burner (practicability to manufacture, install, and service); (3) condensing pulse combustion (technological feasibility); and (4) improved fan or blower motor efficiency (practicability to manufacture, install, and service). 84 FR 6095, 6099–6100 (Feb. 26, 2019). DOE also noted that it only considers potential efficiency levels achieved through the use of proprietary designs in the engineering analysis if they are not part of a unique pathway to achieve the efficiency level (*i.e.*, if there are other non-proprietary technologies capable of achieving the same efficiency level). 84 FR 6095, 6099 (Feb. 26, 2019). DOE sought comment on how these criteria would apply to technology options for vented heaters and whether the previously screened out technology options should continue to be screened out. 84 FR 6095, 6100 (Feb. 26, 2019).

AHRI stated that the screening criteria are appropriate and will result in most, if not all, of the technology options being eliminated from further consideration. AHRI stated elsewhere that the technology options presented are generally not economically justifiable and that AHRI members have indicated that customers will often purchase other heating appliances before purchasing DHE with the listed technology options. AHRI further stated that incorporation of the technologies identified in the February 2019 RFI would require significant investment on the part of manufacturers in the industry. (AHRI, No. 6 at p. 3–4) DOE notes that the five criteria for removing a technology option during the screening analysis are technological feasibility, practicability to manufacture, service or install, adverse impacts on consumer utility, adverse impacts on product safety, and unique-pathway proprietary technologies. The economic justification of a technology option is not considered in the screening analysis.

In evaluating potential technology options for this notice, DOE maintained the list from the February 2019 RFI, as discussed in section III.B.3.b of this document. In addition, DOE did not find that any of the technology options should be screened out from consideration as options for improving the AFUE of vented heaters other than the four previously screened-out.

#### d. Engineering Analysis

For the April 2010 final rule, DOE determined technology options by efficiency level for each of the vented heater product classes. These technology options are found in section 5.7 of the April 2010 final rule technical support document (TSD)<sup>12</sup> and are reproduced in Table III.5 of this document. The representative input rate ranges from the April 2010 final rule are >42,000 Btu/h for gas wall fan type vented heaters, >27,000 Btu/h and ≤46,000 Btu/h for gas wall gravity type vented heaters, >37,000 Btu/h for gas floor vented heaters, and >27,000 Btu/h and ≤46,000 Btu/h for gas room vented heaters. 75 FR 20112, 20114 (April 16, 2010).

<sup>12</sup> Available at: <https://www.regulations.gov/document?D=EERE-2006-STD-0129-0149>.

TABLE III.5—APRIL 2010 FINAL RULE TECHNOLOGY OPTIONS BY EFFICIENCY LEVEL FOR THE REPRESENTATIVE INPUT RATE RANGES OF THE VENTED HEATER PRODUCT CLASSES

| DHE type        | Heat circulation type | Efficiency level (AFUE) | Technology                                                            |
|-----------------|-----------------------|-------------------------|-----------------------------------------------------------------------|
| Gas Wall .....  | Fan Type .....        | *74                     | Standing Pilot.                                                       |
|                 |                       | *75                     | Intermittent Ignition and Two-Speed Blower.                           |
|                 |                       | **76                    | Intermittent Ignition and Improved Heat Exchanger.                    |
|                 |                       | 77                      | Intermittent Ignition, Two-Speed Blower, and Improved Heat Exchanger. |
|                 |                       | 80                      | Induced Draft and Electronic Ignition.                                |
|                 | Gravity Type .....    | *64                     | Standing Pilot.                                                       |
|                 |                       | **66                    | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | *68                     | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | *69                     | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | 70                      | Electronic Ignition.                                                  |
| Gas Floor ..... | All .....             | *57                     | Standing Pilot.                                                       |
| Gas Room .....  | All .....             | **58                    | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | *64                     | Standing Pilot.                                                       |
|                 |                       | *65                     | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | *66                     | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | **67                    | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | 68                      | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | *†83                    | Electronic Ignition and Multiple Heat Exchanger Design.               |

\* No longer available on the market.

\*\* Efficiency level adopted in as the Federal standard the April 2010 final rule at the representative input rate.

\*† This was a theoretical model and was not on the market at the time of the April 2010 final rule analysis.

DOE reviewed the technology options available in the current vented heater market for the representative input rate ranges from the April 2010 final rule. The available efficiency levels and associated technologies are shown in Table III.6 of this document.

TABLE III.6—CURRENT TECHNOLOGY OPTIONS BY EFFICIENCY LEVEL OF THE REPRESENTATIVE INPUT RATE RANGES OF THE VENTED HEATER PRODUCT CLASSES FROM THE APRIL 2010 FINAL RULE

| DHE type        | Heat circulation type | Efficiency level (AFUE) | Technology                                                            |
|-----------------|-----------------------|-------------------------|-----------------------------------------------------------------------|
| Gas Wall .....  | Fan Type .....        | 76                      | Intermittent Ignition and Improved Heat Exchanger.                    |
|                 |                       | 77                      | Intermittent Ignition, Two-Speed Blower, and Improved Heat Exchanger. |
|                 |                       | 80                      | Induced Draft and Electronic Ignition.                                |
|                 |                       | *90                     | Electronic Ignition and Condensing.                                   |
|                 |                       | 66                      | Standing Pilot and Improved Heat Exchanger.                           |
|                 | Gravity Type .....    | 68                      | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | 69                      | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | 70                      | Electronic Ignition.                                                  |
| Gas Floor ..... | All .....             | 58                      | Standing Pilot and Improved Heat Exchanger.                           |
| Gas Room .....  | All .....             | 67                      | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | 68                      | Standing Pilot and Improved Heat Exchanger.                           |
|                 |                       | **83                    | Electronic Ignition and Multiple Heat Exchanger Design.               |

\* Condensing gas wall fan type vented heaters exist in an input rate range that was not the representative input rate range in the April 2010 final rule. Thus, the max-tech level presented is theoretical for the representative input range, but exists in models on the market in other input ranges.

\*\* This is a theoretical efficiency level based on the analysis for the April 2010 final rule, and is not available in any model currently on the market.

The maximum available efficiency level is the highest efficiency model currently available on the market for that class. The max-tech efficiency level represents the theoretical maximum possible efficiency if all available design options are incorporated in a model. In some cases, models at the max-tech efficiency level are not commercially

available because, although the level is technically achievable, manufacturers have determined that it is not economically feasible (either for the manufacturer to produce or for consumers to purchase). However, DOE seeks to determine the max-tech level for purposes of its analyses. The current maximum available efficiencies for the

11 existing product classes are included in Table III.7, along with the maximum available efficiencies from the April 2010 final rule and those evaluated for the October 2016 final determination.

TABLE III.7—MAXIMUM AVAILABLE EFFICIENCY LEVELS FOR THE VENTED HEATER PRODUCT CLASSES—CURRENT AND PREVIOUS RULEMAKINGS

| Product class               | Input rate, kBtu/h | 2019 | October 2016 final determination | April 2010 final rule |
|-----------------------------|--------------------|------|----------------------------------|-----------------------|
| Gas Wall Fan Type .....     | ≤42 .....          | 90   | 92                               | 83                    |
|                             | >42 .....          | 80   | 80                               | 80                    |
| Gas Wall Gravity Type ..... | ≤27 .....          | 72   | 80                               | 80                    |
|                             | >27 and ≤46 .....  | 70   | 69                               | 69                    |
|                             | >46 .....          | 70   | 70                               | 69                    |
| Gas Floor .....             | ≤37 .....          | 57   | 57                               | 57                    |
|                             | >37 .....          | 58   | 58                               | 58                    |
| Gas Room .....              | ≤20 .....          | 71   | 71                               | 59                    |
|                             | >20 and ≤27 .....  | 66   | 66                               | 63                    |
|                             | >27 and ≤46 .....  | 68   | 68                               | 81                    |
|                             | >46 .....          | 70   | 70                               | 70                    |

In the April 2010 final rule, DOE determined max-tech efficiency levels using the technology options available at that time. For gas wall fan type vented heaters with an input rate over 42,000 Btu/h, DOE identified a max-tech efficiency level design with induced draft combustion and electronic ignition, resulting in an AFUE of 80 percent. For gas wall gravity type vented heaters with an input rate over 27,000 Btu/h and up to 46,000 Btu/h, DOE identified 70 percent AFUE as a theoretical max-tech level, which was achievable with an improved heat exchanger design and electronic ignition. For gas floor vented heaters with an input rate over 37,000 Btu/h, DOE identified the max-tech efficiency level as 58 percent AFUE, which DOE stated could be reached using a standing pilot light and an improved heat exchanger design. For gas room vented heaters with an input rate over 27,000 Btu/h and up to 46,000 Btu/h, DOE identified a theoretical max-tech efficiency level of 83 percent AFUE, which manufacturers could achieve using an electronic ignition and a multiple heat exchanger design. 75 FR 20112, 20145–20146 (April 16, 2010).

In the October 2016 final determination, DOE noted that condensing gas wall fan type vented heater models with input rates at or below 42,000 Btu/h had become available, and DOE considered this the max-tech level for all gas wall fan type vented heaters. Based on information obtained during manufacturer interviews and a manufacturer production cost developed through a teardown analysis performed for the proposed determination, DOE determined that condensing technology was not economically justified for gas wall fan type vented heaters at that time. 81 FR 21276, 21280 (April 11, 2016); 81 FR 71325, 71328–71329 (Oct. 17, 2016).

Since the October 2016 final determination, the highest efficiency condensing gas wall fan type vented heater, with an input rate at or below 42,000 Btu/h, available on the market has been rerated (*e.g.*, the same model number has been rated with at least two different AFUE values between the October 2016 final determination and this NOPD) from an AFUE of 92 percent to an AFUE of 90 percent, which is the only condensing AFUE level on the market. The maximum available AFUE for gas wall gravity type vented heaters, with an input rate over 27,000 Btu/h and up to 46,000 Btu/h, increased to 70 percent, which is the max-tech level analyzed in the April 2010 final rule. In total, the maximum available AFUE decreased for two input rate ranges and increased for one input rate range. All other input rate ranges have the same maximum available AFUE as in the October 2016 final determination.

In response to the February 2019 RFI, AHRI stated that condensing, multi-stage vented heaters equipped with combustion and circulating fans should be considered the max-tech technology option. (AHRI, No. 6 at p. 4) The commenter added that condensing vented heaters continue to be significantly more expensive to produce than non-condensing models and are by and large not economically justified. AHRI also stated that only one manufacturer produces condensing vented heaters and that there are only two models listed in the AHRI Directory. *Id.* Lastly, AHRI generally recommended against the use of the maximum available efficiency levels as possible energy conservation standards. *Id.*

Joint Advocates estimated that condensing gas wall fan type vented heaters would reduce energy use by about 17 to 18 percent over models at the baseline. (Joint Advocates, No. 7 at p. 2) CA IOUs stated that higher

condensing efficiencies could be achieved through the use of microprocessor controls, a two-stage heat exchanger, and multi-speed blowers for venting and air circulation. According to the CA IOUs, there are two manufacturers of condensing vented heaters, so those commenters recommended that DOE consider the condensing technology option. CA IOUs asserted that as this option gains popularity with manufacturers, there is the likelihood of increased market share leading to larger production volumes and a decrease in consumer costs due to economies of scale and increased competition. (CA IOUs, No. 8 at p. 4)

As noted, AHRI stated that there is one manufacturer of condensing gas wall fan type vented heaters, whereas the CA IOUs stated that there are two manufacturers and supplied manufacturer literature from the two manufacturers. (AHRI, No. 6 at p. 4; CA IOUs, No. 8 at p. 4) To assess this discrepancy, DOE reviewed the supplied literature and found that the literature was last updated in 2017 and could not find the models on the manufacturer's website. Consequently, DOE has tentatively determined that there is only one manufacturer of condensing gas wall fan type vented heaters on the market at the time of this NOPD.

Consistent with comments and the evaluation in the October 2016 final determination, DOE considers condensing technology to be the “max-tech” levels for gas wall fan type vented heaters.

As explained in section II.B.6 of this document, DOE published the July 2019 NOPIR in the **Federal Register** which proposed to interpret EPCA to provide that adoption of energy conservation standards that would limit the market to natural gas and/or propane furnaces, water heaters, or similarly-situated products/equipment (where permitted

by EPCA) that use condensing combustion technology would result in the unavailability of a performance-related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) and 42 U.S.C. 6316(a). 84 FR 33011, 33021 (July 19, 2019). In light of the July 2019 NOPIR, DOE further investigated the venting options associated with condensing and non-condensing DHE. Categories of venting appliances are defined in the 2018 National Fire Protection Association (NFPA) 54/American National Standards Institute (ANSI) Z223.1 National Fuel Gas Code, titled “NFPA 54 National Fuel Gas Code” (NFPA 54–2018). Currently, the only models on the market using condensing technology are gas wall fan type vented heaters. Through an examination of these products’ installation literature, condensing gas wall fan type vented heaters are installed using Category IV <sup>13</sup> venting. Non-condensing gas wall fan type vented heaters are typically installed using either Category I <sup>14</sup> or Category III <sup>15</sup> venting. Therefore, products using condensing technology require a different venting system (*i.e.*, Category IV venting) than non-condensing DHE (which typically use either Category I or Category III venting). As a result, DHE are similarly situated relative to residential furnaces and commercial water heaters, in that replacing an existing non-condensing vented heater with a vented heater that uses condensing technology may require significant changes to the existing vent system. As such, DOE’s proposed interpretation in the July 2019 NOPIR, if finalized, would apply to DHE.

Under the proposed interpretation in the July 2019 NOPIR, DOE would consider whether non-condensing combustion technology justified a separate product class under 42 U.S.C. 6296(q). If DOE determined that such technology did justify a separate product class for DHE, DOE would consider establishing separate standards for a condensing DHE product class and a non-condensing DHE product class (or through classes that maintain venting

compatibility, as DOE determines appropriate). As a result, although DOE considers condensing technology to represent the max-tech design for gas wall fan type vented heaters, if a separate product class were to be established for condensing gas wall fan type vented heaters, there would be no additional energy savings associated with the max-tech level, as discussed in sections III.B.3.e and III.B.3.h of this document.

National Grid stated that it found a gas floor vented heater with a rated AFUE of 70 percent and suggested that the minimum AFUE for gas floor vented heaters should be increased. (National Grid, No. 9 at p. 1) However, all of the gas floor vented heater models that DOE found in the CCMS database and AHRI Directory have rated AFUE values at the baseline (*i.e.*, 57 percent for models at or below 37,000 Btu/h and 58 percent for models above 37,000 Btu/h). DOE was unable to find the model identified by National Grid in its product research, and the Department seeks additional information regarding the highest available efficiency and maximum possible efficiency for gas floor vented heaters. Thus, for the purposes of this analysis, DOE tentatively considers the maximum available AFUE values found in Table III.7 of this document to be the max-tech efficiency levels.

The Joint Advocates and the CA IOUs encouraged DOE to perform an engineering analysis on all 11 product classes of vented heaters. (Joint Advocates, No. 7 at p. 2; CA IOUs, No. 9 at p. 2) The Joint Advocates also stated that there is significant market availability of gas wall vented heaters, both fan type and gravity type, which exceed the current energy conservation standard levels. (Joint Advocates, No. 7 at p. 1) DOE agrees that there are models on the market which exceed the current energy conservation standards, but as discussed in this section, the technology options have not changed significantly since the April 2010 final rule and October 2016 final determination. Because the technology options have not changed significantly, the energy use of all vented heaters remains approximately the same (see section III.B.3.e of this document). As discussed in section III.B.3.e of this document, DOE has tentatively determined that at max-tech the potential energy savings resulting from amended standards, set at levels based on the technology options analyzed during the April 2010 final rule and October 2016 final determination, would not result in significant energy savings. Furthermore, as discussed in section III.C.2 of this document, DOE has tentatively

determined that the potential benefits from amended standards would be outweighed by burdens on manufacturers, in particular, small business manufacturers, as vented heater shipments have previously declined, and there is no evidence that shipments have increased since the October 2016 final determination. As such, a full engineering analysis of all 11 product classes of vented heaters is not necessary.

#### Manufacturer Production Costs

After establishing the efficiency levels in the April 2010 final rule, DOE estimated the manufacturer production cost (MPC) of attaining each efficiency level based on the technology options identified for that level. The MPC takes into account the costs for material, labor, depreciation, and overhead. These values were developed based on product teardowns that generated bills of materials for all components and manufacturing processes required to manufacture vented heaters at a given efficiency level for each product class. DOE uses these bills of material, along with information on material and component prices, costs for labor, depreciation, and overhead to derive the MPC. In development of the April 2010 final rule, manufacturer interviews were conducted to verify the accuracy of the inputs to DOE’s analysis of MPCs (*e.g.*, material prices, labor rates) and the resulting MPCs. 75 FR 20112, 20147–20148 (April 16, 2010).

DOE reviewed its April 2010 final rule engineering analysis to determine whether the results are still valid in the context of the current market. As the technology options have not changed significantly since the April 2010 final rule and the market conditions for manufacturers remains substantially the same as the previous rulemaking (*i.e.*, production volumes remain similar or slightly lower than previously projected, while material prices and labor rates are also similar), DOE has tentatively determined that the engineering analysis performed during the April 2010 final rule is still valid. DOE also reviewed retail prices for models currently available on the market and found that the current retail prices are comparable to those published in chapter 8, section 8.2.3.5 of the April 2010 final rule TSD, when adjusted for inflation. Because DOE has not found distribution channels or mark-ups to have changed since April 2010, the similarity of the predicted retail prices in the April 2010 final rule analysis to those of current products indicates that the manufacturer production costs are

<sup>13</sup> NFPA 54–2018 defines a “Category IV Vented Appliance” as an appliance that operates with a positive vent static pressure and with a vent gas temperature that can cause excessive condensate production in the vent.

<sup>14</sup> NFPA 54–2018 defines a “Category I Vented Appliance” as an appliance that operates with a non-positive vent static pressure and with a vent gas temperature that avoids excessive condensate production in the vent.

<sup>15</sup> NFPA 54–2018 defines a “Category III Vented Appliance” as an appliance that operates with a positive vent static pressure and with a vent gas temperature that avoids excessive condensate production in the vent.

also likely to be unchanged from the April 2010 final rule analysis.

#### e. Energy Use Analysis

Table III.8 presents the average energy consumption, from section 7.3.6 of the

April 2010 final rule TSD, for each vented heater product class and efficiency level. DOE has tentatively concluded that the current average energy consumption for these vented heaters is comparable to the estimates

developed for the April 2010 final rule and relied on in the October 2016 final determination, as the technology options at each efficiency level have not changed substantially.

TABLE III.8—AVERAGE ENERGY CONSUMPTION FOR THE VENTED HEATER PRODUCT CLASSES FROM APRIL 2010 FINAL RULE

| DHE type        | Heat circulation type | Efficiency level (AFUE) | Average energy consumption |                      |
|-----------------|-----------------------|-------------------------|----------------------------|----------------------|
|                 |                       |                         | Gas (MMBtu/yr)             | Electricity (kWh/yr) |
| Gas Wall .....  | Fan Type .....        | * 74                    | 29.9                       | 38.6                 |
|                 |                       | * 75                    | 28.2                       | 45.7                 |
|                 |                       | ** 76                   | 27.8                       | 45.2                 |
|                 |                       | 77                      | 27.4                       | 44.7                 |
|                 |                       | 80                      | 26.3                       | 66.2                 |
|                 | Gravity Type .....    | * 64                    | 29.9                       | 0.0                  |
|                 |                       | ** 66                   | 29.0                       | 0.0                  |
|                 |                       | * 68                    | 28.2                       | 0.0                  |
|                 |                       | * 69                    | 27.8                       | 0.0                  |
|                 |                       | 70                      | 26.5                       | 17.7                 |
| Gas Floor ..... | All .....             | * 57                    | 30.8                       | 0.0                  |
|                 |                       | ** 58                   | 30.3                       | 0.0                  |
| Gas Room .....  | All .....             | * 64                    | 27.5                       | 0.0                  |
|                 |                       | * 65                    | 27.1                       | 0.0                  |
|                 |                       | * 66                    | 26.7                       | 0.0                  |
|                 |                       | ** 67                   | 26.3                       | 0.0                  |
|                 |                       | 68                      | 26.0                       | 0.0                  |
|                 |                       | * † 83                  | 20.2                       | 81.1                 |

\* No longer available on the market.

\*\* Efficiency level adopted in as the Federal standard the April 2010 final rule at the representative input rate.

† This was a theoretical model and was not on the market at the time of the April 2010 final rule analysis.

As discussed in section III.B.3.d of this document, in the event that amended energy conservation standards are economically justified for gas wall fan type vented heaters at a level which would require condensing technology, then at that time, separate product classes would likely have to be considered to effectively separate non-condensing and condensing technologies in order to preserve non-condensing products, consistent with the proposals in the July 2019 NOPIR and September 2020 SNOPIR. Also as stated in section III.B.3.d of this document, there is only one available condensing AFUE level on the market, which is identified as the max-tech level. As such, the baseline AFUE for a potential condensing product class would be set at the only available AFUE level, and there would be no potential for energy savings in a condensing gas wall fan type vented heater product class, so, therefore, DOE has not presented energy use values for condensing gas wall fan type vented heaters.

#### f. Life-Cycle Cost and Payback Period Analysis

LCC is the total consumer expense over the life of an appliance, including

the total installed cost and operating costs (including energy expenditures, maintenance, and repair). DOE discounts future operating costs to the time of purchase, and sums them over the lifetime of the product.

The total installed cost is determined by combining the installation cost with the equipment price. The equipment price is determined using the MPC and applying a manufacturer mark-up, a wholesaler mark-up, a mechanical contractor mark-up, and sales tax.<sup>16</sup> As presented in section III.B.3.d of this document, DOE has tentatively determined that the MPC has not changed significantly since the April 2010 final rule. DOE has also tentatively concluded that the average mark-ups, sales taxes, and installation costs are comparable to the estimates developed for the April 2010 final rule. Therefore, the total installed costs are estimated to have remained approximately the same, as compared to the April 2010 final rule, for products that are still on the market, as the technology options have not

changed. DOE additionally estimates that the total installed cost for the 90-percent AFUE gas wall fan type vented heater would be considerably higher compared to lower efficiency gas wall fan type vented heaters, since there are considerable development and production costs (as discussed in section III.B.3.d of this document), as well as additional installation costs.

The annual operating cost is determined by the energy consumption of vented heaters, the energy prices of the fuel used, and any repair and maintenance costs that would be required. DOE has tentatively determined that the energy consumption (as discussed in section III.B.3.e of this document) and repair and maintenance costs associated with each efficiency level have not changed significantly from that in the April 2010 final rule for the vented heaters that are still on the market, as the technology options have not changed. DOE additionally estimates that the average energy consumption for the 90-percent AFUE gas wall fan type vented heater would be proportionally lower compared to the 80-percent AFUE gas wall fan type vented heaters, and repair and maintenance costs would be higher than for the 80-percent AFUE gas wall

<sup>16</sup> For new construction, builder mark-up is also included. For the April 2010 final rule, the new construction market shares are 10 percent for vented gas wall fan, vented gas wall gravity, and vented gas room heaters, and 0 percent for vented gas floor furnace heaters.

fan type vented heaters. To assess the impact of energy prices, DOE compared the April 2010 final rule's average energy prices for 2013 (*i.e.*, the starting year in the analysis) to a likely starting year if DOE performed a revised analysis in a new rulemaking. The April 2010 final rule used Energy Information Administration's (EIA) *Annual Energy Outlook (AEO)* 2010 energy price trends.<sup>17</sup> To assess the impact of updated energy price estimates, DOE used EIA's *AEO* 2020 energy price trends to estimate the energy prices in 2027,<sup>18</sup> the expected compliance year for the updated analysis.<sup>19</sup> DOE has found that both natural gas and propane prices are significantly lower in 2027 (\$10.99/MMBtu in 2019\$ and \$28.20/MMBtu in 2019\$, respectively) compared to the 2013 natural gas and propane prices used in the April 2010 final rule (\$13.31/MMBtu in 2019\$ and \$32.71/MMBtu in 2019\$, respectively).<sup>20</sup> Additionally, the 30-year trends are comparable in the two *AEO* editions. Due to comparable energy use and lower energy prices, DOE has tentatively determined that the annual operating cost of vented heaters has either decreased or not changed significantly from that estimated in the April 2010 final rule.

As vented heaters have not significantly changed since the April 2010 final rule, DOE has tentatively determined that the product lifetime has remained largely the same. DOE has also tentatively determined that residential discount rates have not changed significantly from those in the April 2010 final rule.

Because the total installed costs are estimated not to have changed significantly, and operating costs are estimated to be comparable, DOE has tentatively determined that the LCC savings for each efficiency level of vented heaters are similar to the estimates in the April 2010 final rule.

<sup>17</sup> U.S. Department of Energy—Energy Information Administration, *Annual Energy Outlook 2010 with Projections to 2035 (Early Release)* (Available at: <https://www.eia.gov/outlooks/aeo/>) (Last accessed August 13, 2020).

<sup>18</sup> For purposes of the updated analysis, DOE estimated 2027 as the first year of compliance by assuming that the publication of a potential final rule would occur by 2022 and any amended standards would apply to DHEs manufactured 5 years after this date. (42 U.S.C. 6295(m)(4)(A)(ii)).

<sup>19</sup> U.S. Department of Energy—Energy Information Administration, *Annual Energy Outlook 2020 with Projections to 2050* (Available at: <https://www.eia.gov/outlooks/aeo/>) (Last accessed August 13, 2020).

<sup>20</sup> For the April 2010 final rule, the fraction of propane installations is 12 percent for vented gas wall fan and vented gas wall gravity, 9 percent for vented gas floor furnace heaters, and 38 percent for vented gas room heaters.

Further, DOE has tentatively determined that the relative comparisons between each efficiency level for each product class remain unchanged and that the conclusions from the April 2010 final rule and October 2016 final determination are still applicable.

The PBP is the amount of time it takes the consumer, in a typical case, to recover the estimated higher purchase expense of more energy-efficient products through lower operating costs. Numerically, the PBP is the ratio of the increase in purchase expense (*i.e.*, due to a more energy-efficient design) to the decrease in annual operating expenditures. This type of calculation is known as a “simple” payback period, because it does not take into account changes in operating expense over time or the time value of money (*i.e.*, the calculation is done at an effective discount rate of zero percent). Payback periods are expressed in years. Payback periods greater than the life of the product indicate that the increased total installed cost is not recovered by the reduced operating expenses.

As previously stated, DOE has estimated that the total installed costs have not changed significantly, and operating costs are comparable to the April 2010 final rule results. Therefore, DOE has tentatively determined that the “simple” payback period for each efficiency level of vented heaters is similar to the “simple” payback period results from the April 2010 final rule. Further, DOE has tentatively determined that the relative comparisons between each efficiency level for each product class remain unchanged and that the conclusions from the April 2010 final rule and October 2016 final determination are still applicable.

#### g. Shipments

In the February 2019 RFI, DOE stated that from the April 2010 final rule, the Department has vented heater historical shipment data from AHRI for gas wall vented heaters from 1990 to 1998 and from 2000 to 2006, for gas floor vented heaters from 1990 to 2007, and for gas room vented heaters from 1990 to 2005. DOE also has limited disaggregated shipments for fan type and gravity type gas wall vented heaters and by input capacity. DOE requested comment on the annual sales data (*i.e.*, number of shipments) for each vented heater product class from 2008–2018. 84 FR 6095, 6104–6105 (Feb. 26, 2019).

AHRI stated that it was conducting a special data collection to gather shipment data for each vented heater product class from 2016–2018, and that these data will be provided to DOE at a later date. AHRI also stated that

shipment data from 2008–2015 was provided in response to the NOPD for direct heating equipment published in 2016. (AHRI, No. 6 at p. 4)

In 2016, AHRI presented data showing the percentage change in total shipments for the years 2010–2015 compared with the total shipments over the period 2001–2006, estimating that gas wall vented heater shipments were 21 percent less, that direct vent gas wall vented heater (a form of gas wall vented heater) shipments were 31 percent less, and that gas room vented heater shipments were 44 percent less.<sup>21</sup> AHRI did not have an active statistics program for gas floor vented heaters and was attempting to collect annual shipments information for recent years through a special data collection.

At this time, AHRI has not submitted data for the 2016–2018 time period. However, DOE will consider any additional data submissions from AHRI (or other interested parties) when making the final determination with respect to whether amended standards for DHE are justified.

#### h. National Energy Savings

As explained in sections III.B.3.d through III.B.3.g of this document, the technology options, energy use, and shipments for DHE have not changed significantly since the April 2010 final rule and October 2016 final determination. Accordingly, the national energy savings are expected to be largely the same as the national energy savings projected in the April 2010 final rule. In the April 2010 final rule, DOE estimated that the max-tech TSL (TSL 6) would result in an additional 0.13 quads of site energy savings over 30 years, as compared to the adopted TSL (*i.e.*, the current standard levels).<sup>22</sup> The site energy

<sup>21</sup> AHRI Comment to the NOPD for Direct Heating Equipment published in 2016 (June 10, 2016) (Comment No. 7) (Available at: <https://www.regulations.gov/document?D=EERE-2016-BT-STD-0007-0007>) (Last accessed Aug. 13, 2020).

<sup>22</sup> DOE used the April 2010 final rule National Impact Analysis (NIA) spreadsheet for DHE to calculate the site energy savings difference between the max-tech level (TSL 6) and current standard level (then TSL 2). The site energy savings are available in the “National Impacts Summary” worksheet for each product class. The site energy savings calculation was adjusted to take into account the site energy savings over 30 years of product shipments (2013–2042) and to include the full lifetime of products shipped over the 30-year period (2013–2042). The published version of the DHE NIA spreadsheet only accounted for site energy savings from 2013–2042. The resulting 30-year site energy savings per product class are: 0.02 quads for gas wall fan type vented heaters, 0.07 quads for gas wall gravity type vented heaters, 0.00 quads for gas floor vented heaters, and 0.04 quads for gas room vented heaters. The DHE NIA spreadsheet (published March 23, 2010) (Available



savings from the max-tech TSL represent approximately a six-percent reduction compared to the total 30-year site energy consumption, as compared to the current standard levels.<sup>23</sup>

The April 2010 final rule did not contemplate or include a TSL with specific provisions for a condensing gas wall fan type vented heater. As discussed in section III.B.3.b of this document, pursuant to DOE's tentative interpretation from the July 2019 NOPIR, amending energy conservation standards to a level which would require condensing technology would result in the unavailability of a performance-related feature within the meaning of 42 U.S.C. 6295(o)(4). 84 FR 33011, 33021 (July 11, 2019). As such, when evaluating energy savings from potential energy conservation standards, separate non-condensing and condensing product classes are investigated as a possible outcome of the Gas Industry Petition. DOE identified one manufacturer of condensing gas fan type vented heaters which produces two models at 90-percent AFUE. Because there was only one efficiency level available on the market and analyzed at the condensing level, there would be no potential additional energy savings from setting a condensing level for the divided gas wall fan type vented heater product class.

#### i. Manufacturer Impacts

##### December 2009 NOPR

As stated in section II.B.3.b of this document, in the NOPR that preceded the April 2010 final rule, DOE proposed

at: <https://www.regulations.gov/document?D=EERE-2006-STD-0129-0148> (Last accessed Aug. 13, 2020).

<sup>23</sup> DOE used the April 2010 final rule NIA spreadsheet for DHE to calculate the total 30-year site energy consumption at the current standard levels (then TSL 2). The "Base Case Consumption" worksheet is used to calculate the total site energy consumption at the current standard levels for each product class. This worksheet includes the total "source energy (Quads)" per product class. DOE converted the total source energy to site energy by removing the site-to-source factors (which come from the "EnergyPrices SiteToSource" worksheet) from the calculation. The site energy consumption calculation was then expanded to take into account the site energy consumption over 30 years of product shipments (2013–2042) and include the full lifetime of products shipped over the 30 year period (2013–2042), to match the site energy savings calculation. Finally, the totals per product class were adjusted to take into account the energy savings for the current standard (then TSL 2). The resulting 30-year site energy consumption totals per product class are: 0.55 quads for gas wall fan type vented heaters, 1.30 quads for gas wall gravity type vented heaters, 0.02 quads for gas floor vented heaters, and 0.24 quads for gas room vented heaters. The 0.13 quads of 30-year site energy savings from the max-tech TSL are then divided by the resulting total value of 2.11 quads for the 30-year site energy consumption at the current standard levels, which results in the 6-percent value.

to amend standards for vented heaters to TSL 3. 74 FR 65852, 65973 (Dec. 11, 2009). In response to that proposal, DOE received several comments expressing concerns that:

- Shipments of vented heaters were low, and, therefore, potential energy savings were low;
  - Low shipments would make it difficult for manufacturers to recoup the costs to comply with amended standards;
  - Product offerings may be limited as a response to amended standards;
  - Manufacturers may exit the industry as a result of amended standards;
  - Employment may be negatively impacted due to reduced product lines and insufficient return on investment.
- 75 FR 20112, 20218 (April 16, 2010).

##### April 2010 Final Rule

In the April 2010 final rule, DOE additionally found that the industry had gone through considerable consolidation due to decreased shipments, that product lines were primarily maintained to provide replacement products, and that some small business manufacturers could be disproportionately affected by a more-stringent standard. 75 FR 20112, 20199, and 20218 (April 16, 2010). As mentioned in section III.B.3.g of this document, the April 2010 final rule presented a trend of declining annual shipments throughout the 30-year analysis period. As discussed in section II.B.2.b of this document, DOE ultimately adopted standards at TSL 2 for vented heaters, which was one TSL below the proposed level. In rejecting proposed TSL 3, DOE concluded that the benefits of higher potential standard levels would be outweighed by the economic burden on some consumers, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers of vented heaters, and the potential for small business manufacturers of vented heaters to reduce their product offerings or to be forced to exit the market completely, thereby reducing competition in the vented heater market. 75 FR 20112, 20218–20219 (April 16, 2010).

##### October 2016 Final Determination

In the April 2016 proposed determination that preceded the October 2016 final determination, DOE tentatively determined that the conclusions presented in the April 2010 final rule were still valid. 81 FR 21276, 21281 (April 11, 2016). Further, DOE has found that the number of models offered in each of the vented heater product classes decreased in the time

between the April 2010 final rule and the October 2016 final determination, which indicated that the vented heater market was shrinking and product lines were mainly maintained as replacements for current vented heater products. 81 FR 71325, 71327 (Oct. 17, 2016).

In the October 2016 final determination DOE noted that the number of manufacturers declined from six to four, indicating consolidation in the vented heater industry. 81 FR 71325, 71328 (Oct. 17, 2016).

##### Current Analysis of Manufacturer Impacts

In DOE's most recent review of the market, a total of five manufacturers were identified within the vented heater industry, four of which are domestic small businesses. In the February 2019 RFI, DOE requested comment on annual sales data for each vented heater product class from 2008–2018. 84 FR 6095, 6105 (Feb. 26, 2019). DOE did not receive any comment or information regarding the number and classification of manufacturers presented in the February 2019 RFI and, therefore, considers its previous analysis of industry shipments to still be valid. DOE also did not receive any comments or data suggesting that DOE's analysis of the DHE market in the April 2016 NOPD was inaccurate. Because the market conditions are substantially the same as when DOE considered manufacturer impacts for the April 2010 final rule and October 2016 final determination, DOE tentatively concludes that manufacturers would likely face similar impacts under more-stringent standards as those previously discussed.

#### 4. Other Issues

##### a. Fuel Switching and Full-Fuel-Cycle

NPGA urged DOE to analyze the potential of fuel switching and correlated effects on energy efficiency. (NPGA, No. 3 at p. 1) The commenter requested that DOE utilize a full-fuel-cycle (FFC) analysis when calculating energy consumption across all product classes and energy types, instead of utilizing a site energy analysis to determine whether to amend the energy standards for DHE. *Id.* NPGA further stated that unless DOE assesses the potential of fuel-switching, it would be prejudicing some energy sources. *Id.*

Because consumers are sensitive to the cost of heating equipment, a standard level that significantly increases purchase price may induce some consumers to switch to a different heating product than they would have otherwise installed (*i.e.*, in the case

where no new standards are established). In the April 2010 final rule, DOE was unable to find any data it could use to estimate the extent of fuel and product switching in its analysis. 75 FR 20112, 20165 (April 16, 2010). As stated, the April 2010 final rule analysis is part of DOE's consideration for the determination proposed in this document. DOE uses FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. *See* 77 FR 49701 (August 17, 2012). As previously explained in the context of rulemakings for other products, it would not be appropriate to incorporate FCC in an energy efficiency metric for energy conservation standards. *See* 81 FR 2628, 2639 (Jan. 15, 2016). First, EPCA provides that "energy conservation standards" must prescribe a "minimum level of energy efficiency" or a "maximum quantity of energy use"; the statute subsequently provides that "energy use" is the quantity of energy directly consumed by a consumer product *at the point of use*, and it defines "energy efficiency" as the ratio of useful heat output of services from a consumer product to the energy use of such product. (42 U.S.C. 6291(4)–(6)) Moreover, the mathematical adjustment to the site-based energy descriptor to calculate an FFC value relies on information that is updated annually. If DOE were to include such an adjustment to the energy conservation standard, DOE would be required to update standards (or applicable test procedure) annually.

#### b. Environmental Analysis, Market Failures, and Market-Based Compliance

PI NYU recommended that DOE consider the environmental costs when analyzing the national impact and selecting the maximum economically justified efficiency level. PI NYU further stated that the benefits from greenhouse gas emissions reductions should be considered and that global, as opposed to domestic-only, estimates of the social cost of greenhouse gas reduction should be used in the national impact analysis. (PI NYU, No. 4 at p. 2)

In response, DOE notes that its rulemaking analyses include consideration of environmental impacts resulting from potential amended standards. In the April 2010 final rule, DOE performed an environmental assessment and considered the benefits resulting from reduced emissions. 75 FR 20112, 20176–20180 (April 16, 2010). Since that time, new legal authority has impacted DOE's approach to

environmental analysis in regulatory rulemaking. Specifically, section 5(c) of Executive Order (E.O.) 13783, "Promoting Energy Independence and Economic Growth," 82 FR 16093 (March 31, 2017), directs agencies to maintain consistency with the guidance contained in the Office of Management and Budget's Circular A–4 (Sept. 17, 2003) when monetizing the value of greenhouse gas emissions resulting from regulations, including with respect to consideration of domestic versus international impacts and appropriate discount rates. Section E.1 of OMB Circular A–4 provides that "analysis should focus on benefits and costs that accrue to citizens and residents of the United States," and it further provides that "[w]here you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately." Accordingly, DOE has structured its environmental assessment and regulatory analyses so as to conform to these legal requirements.

The Joint Advocates stated that DHE are largely used in older homes, many of which may be occupied by renters. The commenters stated that the landlord purchases the heating equipment, while the tenant typically pays the heating bill; therefore, there is no financial incentive for the person buying the DHE in these situations to purchase efficient units. (Joint Advocates, No. 7 at p. 2) DOE tentatively agrees with the Joint Advocates that when a landlord purchases heating equipment and the tenant pays the heating bill, there is no financial incentive for the landlord to purchase a more-efficient product.

PI NYU resubmitted comments originally submitted in response to an energy conservation program design RFI published in the **Federal Register** on November 28, 2017. 82 FR 56181. These comments discussed the addition of market-based compliance flexibilities such as credit trading, feebates, or intra-firm averaging to the Appliance Standards Program.

In the present document in which DOE is determining whether standards for DHE need to be amended, EPCA requires DOE to consider the technological feasibility of amended standards, whether such standards would result in a significant conservation of energy, and whether such standards would be cost-effective. (42 U.S.C. 6295(m)(1)(A); 42 U.S.C. 6295(n)(2)) As such, the standards evaluated for the purpose of this proposed determination are the current energy conservation standards and standards at more-stringent levels, not

potential market-based compliance strategies.

#### c. Product Labeling

National Grid stated that many gas floor vented heaters were listed online without their associated AFUE value and recommended that AFUE should be indicated on all product specifications so that consumers can see the efficiency of the product compared to the range of products on the market. (National Grid, No. 9 at p. 1) DOE notes that all covered DHE must be certified to DOE under 10 CFR 429.22, and the associated AFUE ratings are included in the CCMS database.<sup>24</sup> Representations of AFUE are not required in product literature, but representations of efficiency other than the AFUE metric established by DOE are not allowed. (*See* 42 U.S.C. 6293(c)(1))

#### d. Standard Level Recommendations

In response to the February 2019 RFI, DOE received several comments opining on the appropriate course of action for DHE energy conservation standard levels. AHAM argued that the burdens outweigh the benefits of increasing energy conservation standards, while AHRI stated that the conclusion that amended standards for DHE are not economically justified remains true today. (AHAM, No. 5 at p. 2; AHRI, No. 6 at p.1)

NEEA stated it supports increasing energy conservation standards when there are technology options available, arguing that vented heaters are typically inefficient when compared to other heating options (*i.e.*, non-DHE heating products). (NEEA, No. 10 at p. 1) NEEA encouraged DOE to increase energy conservation standards for gas wall vented heaters, and that organization specifically suggested a level of 80-percent AFUE for gas wall fan type vented heaters due to the high number of models available. (NEEA, No. 10 at p. 1) PI NYU stated that DOE should continue to select the maximum energy conservation standard level that is technologically feasible and cost-benefit justified. (PI NYU, No. 4 at p. 16)

#### C. Proposed Determination

After carefully considering the comments on the February 2019 RFI and the available data and information, DOE has tentatively determined that energy conservation standards for DHE do not need to be amended, for the reasons explained in the paragraphs immediately following. DOE will consider all comments received on this proposed determination prior to issuing

<sup>24</sup> CCMS is available at: <https://www.regulations.doe.gov/ccms/>.

the next document in this rulemaking proceeding.

## 1. Unvented Heaters

As discussed in sections II.B.2 and III.B.1 of this document, the efficiency inherent with unvented electric heaters provides negligible opportunity for energy savings, because any heat loss of the product is transferred to the conditioned space and not wasted. DOE examined the market for unvented gas heaters and unvented oil heaters and found that most models on the market have instructions to turn the pilot light off and, thus, would not be required to measure the standing pilot light input rate. For these reasons, consistent with previous rulemakings in which it has addressed unvented heaters, DOE has tentatively determined that standards for unvented heaters are not needed.

## 2. Vented Heaters

For vented heaters, DOE analyzed each product class—gas wall fan type, gas wall gravity type, gas floor, and gas room—separately in the market and technology assessment (sections III.B.3.a and III.B.3.b of this document), the screening analysis (section III.B.3.c of this document), the engineering analysis (section III.B.3.d of this document), the LCC and PBP analysis (section III.B.3.f of this document), and the shipments analysis (section III.B.3.g of this document), and the Department evaluated all vented heaters together in the energy use analysis (section III.B.3.e of this document), the national energy savings analysis (section III.B.3.h of this document), and the manufacturer impact analysis (section III.B.3.i of this document) when making a determination of whether amended standards are justified under EPCA.

### a. Technological Feasibility

EPCA mandates that DOE consider whether amended energy conservation standards for vented heaters would be technologically feasible. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(B)) For gas floor vented heaters, as discussed in section III.B.3.d of this document, the maximum available efficiency level on the market is at the baseline efficiency level (*i.e.*, the current standard). Since there are no models available on the market above baseline and DOE is unaware of any prototype designs that have demonstrated higher efficiencies for gas floor vented heaters, DOE tentatively concludes that more-stringent standards for gas floor vented heaters are not technologically feasible.

DOE has tentatively determined that there are technology options that would

improve the efficiency of gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters. These technology options are being used in commercially available gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters and, therefore, are technologically feasible. (See section III.B.3.b of this document for further information.) Hence, DOE has tentatively determined that amended energy conservation standards for gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters are technologically feasible.

### b. Cost-Effectiveness

As the next step in the agency's analysis, EPCA requires DOE to then consider whether amended energy conservation standards for gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters would be cost-effective through an evaluation of the savings in operating costs throughout the estimated average life of the covered product compared to any increase in the price of, or in the initial charges for, or maintenance expenses of the covered products which are likely to result from the amended standard. (42 U.S.C. 6295(m)(1)(A), 42 U.S.C. 6295(n)(2)(C), and 42 U.S.C. 6295(o)(2)(B)(i)(II)) As discussed in sections II.B.2.b and III.B.3.f of this document, DOE determined that the LCC and PBP analyses of TSL 3, the TSL immediately above the level adopted as a Federal standard (and which was proposed in the October 2009 NOPR and rejected in the April 2010 final rule), as evaluated in the April 2010 final rule, suggested that initial costs outweighed the consumer benefits. *See also* 81 FR 71325, 71327 (Oct. 17, 2016). DOE has tentatively determined that the LCC and PBP analyses conducted for the April 2010 final rule remain generally applicable.

### c. Significant Energy Savings

EPCA also mandates that DOE consider whether amended energy conservation standards for gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters would result in significant conservation of energy. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(A)) As explained in section II.B.5 of this document, DOE uses a two-step approach that considers both a quad threshold value (0.3 quads of site energy over a 30-year period) and a percentage threshold value (10 percent reduction in energy usage over a 30-year

period) to ascertain whether a potential standard satisfies 42 U.S.C. 6295(o)(3)(B), which requires DOE to avoid setting a standard that “will not result in significant conservation of energy.” As discussed in section III.B.3.e of this document, the technology options for vented heaters have not changed significantly since the April 2010 final rule and October 2016 final determination analyses were conducted. Therefore, DOE based its energy savings analysis on the estimates developed during the April 2010 final rule and October 2016 final determination. Based on its analysis, DOE estimated that for gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters, potential site energy savings from more-stringent standards at the max-tech level would be 0.13 quads, which is less than quad threshold value of 0.3 quads. As the quad threshold value was not met at max-tech, DOE next considered the percentage threshold. DOE again referred to the analysis conducted for the April 2010 final rule and estimated that the reduction in site energy use under an energy conservation standard at the max-tech level would be six percent, which is less than the percentage threshold of 10 percent. As both the quad and percentage thresholds are not met, DOE has tentatively determined that amended standards would not result in significant conservation of energy. This tentative conclusion, if confirmed after review of public comments, would be sufficient on its own under EPCA to support a determination that the energy conservation standards for DHE do not need to be amended.

### d. Further Considerations

As previously discussed, DOE is required to publish either a notification of a determination that standards for vented heaters do not need to be amended, or a NOPR including new proposed standards. (42 U.S.C. 6295(m)(1) and 42 U.S.C. 6295(m)(3)(B)) If DOE publishes a NOPR including new proposed standards, the proposed standards must be designed to achieve the maximum improvement in energy efficiency, which DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(m)(1)(B); 42 U.S.C. 6295(o)(2)(A)). In determining whether new proposed standards would be economically justified, DOE must determine whether the benefits of the standards exceed their burdens by, to the greatest extent practicable, considering, the seven

statutory criteria previously discussed. (42 U.S.C. 6295(o)(2)(B)(i))

For gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters, DOE considered the findings of the April 2010 final rule and the October 2016 final determination, in addition to comments received in response to the February 2019 RFI. As discussed in section III.B.3.g of this document, the number of vented heater shipments were projected to decline in the April 2010 final rule, and comments received during the rulemaking that resulted in the October 2016 final determination indicated that shipments have indeed continued to decline since the previous analysis was conducted. Further, DOE stated in the April 2016 NOPD which preceded the October 2016 final determination that shipments were in fact lower than projected in the April 2010 final rule, indicating that the decline has been faster than expected. 81 FR 21276, 21281 (April 11, 2016). This supports the notion that the vented heater market is continuing to shrink, that product lines are mainly maintained as replacements for existing vented heaters units, and that new product lines generally are not being developed. In addition, the one new manufacturer of vented heaters that has entered the market since the October 2016 final determination only produces two models, neither of which have AFUE values outside of the range offered by other manufacturers, or any other characteristics that make them unique from other products already on the market. As discussed in sections III.B.3.a and III.B.3.d of this document, DOE found that the available AFUE values have largely stayed the same or decreased, with more-efficient products being taken off the market or related to lower AFUE values.

As discussed in section III.B.3.f of this document, an examination of how the inputs to the LCC and PBP analysis have changed since the April 2010 final rule indicates that the LCC and PBP results from the April 2010 final rule would be comparable today. As discussed in section III.B.3.i of this document, DOE did not receive any comments or data in response to the February 2019 RFI that suggested a change in the historical trends within this industry.

In the April 2010 final rule, DOE rejected higher standards, finding that capital conversion costs would lead to a large reduction in INPV and that small businesses would be disproportionately impacted, which would outweigh any benefits from higher standard levels. 75 FR 20112, 20217–20218 (April 16, 2010). Upon reviewing the current

market for vented heaters, DOE has tentatively determined that its prior determination regarding the impact on INPV remains valid (*i.e.*, standard levels above the current Federal energy conservation standard would require manufacturers to make significant capital investments of the magnitude initially projected in the April 2010 final rule). As shipments for vented heaters have continued to decrease, manufacturers would be required to make investments to update model lines and manufacturing facilities with fewer shipments over which to spread the cost. This would lead to even more difficulty in recovering their investment than was projected in the April 2010 final rule.

In addition, DOE has initially determined that its conclusions regarding small business impacts from the April 2010 final rule and the October 2016 final determination are still valid concerns (*i.e.*, small businesses would be likely to reduce product offerings or leave the vented heater market entirely if the standard were to be set above the level adopted in that rulemaking). Four of the five identified manufacturers of gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters are small businesses.

#### e. Standby Mode and Off Mode

DOE also considered whether to establish energy conservation standards for standby mode and off mode electrical energy use. Fossil fuel energy use in standby mode and off mode is already included in the AFUE metric, so, therefore, separate standards for standby mode and off mode fossil fuel energy consumption are not needed. Given that the technologies in vented heaters are largely unchanged from those in the April 2010 final rule and October 2016 final determination, electric standby mode and off mode energy use is still very small in comparison to fossil fuel energy, and, thus, presents a relatively small potential for energy savings. DOE has tentatively determined that any energy savings from establishing energy conservation standards for standby mode and off mode electrical energy use, even when considered with active mode, would not increase the energy savings to a level above the quad or percentage threshold values established in the Process Rule and described in section II.B.5 of this document.

#### f. Summary

For gas floor vented heaters, DOE tentatively concludes that more-stringent standards for gas floor vented

heaters are not technologically feasible. As such, DOE also tentatively concludes that there is no conservation of energy possible from including gas floor vented heaters. Therefore, DOE has tentatively determined that amended standards for gas floor vented heaters are not needed.

For gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters DOE has tentatively determined that amended standards would not result in significant conservation of energy. Further, the potential benefits from amended standards would be outweighed by burdens on manufacturers. As such, DOE has tentatively determined that new proposed standards would not be economically justified. Therefore, DOE has tentatively determined that amended standards for gas wall fan type vented heaters, gas wall gravity type heaters, and gas room vented heaters are not needed.

### IV. Procedural Issues and Regulatory Review

#### A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed determination does not constitute a “significant regulatory action” under section 3(f) of E.O. 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) at OMB.

#### B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs.” 82 FR 9339 (Feb. 3, 2017). E.O. 13771 stated the policy of the Executive Branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. This notification of proposed determination is expected to be an E.O. 13771 “Other Action.”

Additionally, on February 24, 2017, the President issued E.O. 13777, “Enforcing the Regulatory Reform Agenda.” 82 FR 12285 (March 1, 2017). E.O. 13777 required the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that 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. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (1) Eliminate jobs, or inhibit job creation;
- (2) Are outdated, unnecessary, or ineffective;
- (3) Impose costs that exceed benefits;
- (4) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (5) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (6) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE initially concludes that this proposed determination is consistent with the directives set forth in these Executive Orders. As discussed in this document, DOE has initially determined that amended energy conservation standards for DHE products are not needed. Therefore, if finalized as proposed, this determination is expected to be an E.O. 13771 "Other Action."

#### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 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 (<http://energy.gov/gc/office-general-counsel>).

DOE reviewed this proposed determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. Because DOE is proposing not to amend standards for DHE, if adopted, the determination would not amend any energy conservation standards. On the basis of the foregoing, DOE certifies that the proposed determination, if adopted, would not have a "significant economic impact on a substantial number of small entities." Accordingly, DOE has not prepared an IRFA for this proposed determination. DOE will transmit this certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

#### *D. Review Under the Paperwork Reduction Act*

This proposed determination, which proposes to determine that amended energy conservation standards for DHE would be unneeded as they would either be technologically infeasible (unvented heaters and gas floor vented heaters), or would not result in significant conservation of energy (gas wall fan type vented heaters, gas wall gravity type vented heaters, and gas room vented heaters), would impose no new informational or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

#### *E. Review Under the National Environmental Policy Act of 1969*

DOE is analyzing this proposed action in accordance with the National Environmental Policy Act of 1969 (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for actions which are interpretations or rulings with respect to existing regulations. 10 CFR part 1021, subpart D, Appendix A4. DOE anticipates that this action qualifies for categorical exclusion A4 because it is an interpretation or ruling in regards to an existing regulation and otherwise meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final action.

#### *F. Review Under Executive Order 13132*

E.O. 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 proposed determination and has tentatively determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed determination. 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) As this proposed determination would not amend the standards for DHE, there is no impact on the policymaking discretion of the States. Therefore, no action is required by E.O. 13132.

#### *G. Review Under Executive Order 12988*

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," 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. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that 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 E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed determination meets the relevant standards of E.O. 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. Public Law 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. DOE’s policy statement is also available at: [http://energy.gov/sites/prod/files/gcprod/documents/umra\\_97.pdf](http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf).

DOE examined this proposed determination according to UMRA and its statement of policy and determined that the proposed determination does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of \$100 million or more in any one year. As a result, the analytical requirements of UMRA do not apply.

#### *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 proposed determination would 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 E.O. 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), DOE has determined that this proposed determination would 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 NOPD under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### *L. Review Under Executive Order 13211*

E.O. 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 OIRA at 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 E.O. 12866, or any successor Executive Order; and (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.

This proposed determination, which does not propose to amend the energy conservation standards for DHE, is not a significant regulatory action under E.O. 12866. Moreover, 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 at OIRA. Therefore, it is not a significant energy action, and accordingly, DOE has not prepared a Statement of Energy Effects.

#### *M. Review Under the 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 peer reviews of the energy conservation standards development process and the analyses that are typically used and has prepared a Peer Review report pertaining to the energy conservation standards rulemaking analyses.<sup>25</sup> 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. DOE has determined that the peer-reviewed analytical process continues to reflect current practice, and the Department followed that process for considering amended

<sup>25</sup> “Energy Conservation Standards Rulemaking Peer Review Report” (2007) (Available at: <http://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0>).

energy conservation standards in the case of the present action.

## V. Public Participation

### A. Participation in the Webinar

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. If you plan to attend, please notify Appliance and Equipment Standards Program staff at [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

Please note that foreign nationals participating in the webinar (or public meeting, if one is held) are subject to advance security screening procedures which require advance notice prior to attendance. If a foreign national wishes to participate, please inform DOE as soon as possible by contacting Ms. Regina Washington at (202) 586-1214 or by email: [Regina.Washington@ee.doe.gov](mailto:Regina.Washington@ee.doe.gov) so that the necessary procedures can be completed.

Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: [https://www1.eere.energy.gov/buildings/appliance\\_standards/standards.aspx?productid=57&action=viewlive](https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=57&action=viewlive). Participants are responsible for ensuring their systems are compatible with the webinar software.

### B. Procedures for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the webinar. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section of this document. The request and advance copy of statements must be received at least one week before the webinar and may be emailed, hand-delivered, or sent by postal mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

### C. Conduct of the Webinar

A DOE official will preside at the webinar and may also use a professional facilitator to aid discussion. The webinar will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record

the proceedings and prepare a transcript. A transcript of the webinar will be included on DOE's website: [https://www1.eere.energy.gov/buildings/appliance\\_standards/standards.aspx?productid=57&action=viewlive](https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=57&action=viewlive). In addition, any person may buy a copy of each transcript from the transcribing reporter. Public comment and statements will be allowed prior to the close of the webinar.

### D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed determination no later than the date provided in the **DATES** section at the beginning of this proposed determination. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

*Submitting comments via <http://www.regulations.gov>.* The <http://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the

Confidential Business Information section.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

*Submitting comments via email, hand delivery/courier, or postal mail.*

Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to <http://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. With this instruction followed, the cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

*Campaign form letters.* Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

*Confidential Business Information.*

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked "confidential" including all the



information believed to be confidential, and one copy of the document marked “non-confidential” with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE’s policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

## VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notification of proposed determination.

### List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

### Signing Authority

This document of the Department of Energy was signed on November 24, 2020, by Daniel R Simmons, Assistant Secretary for 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 November 24, 2020.

**Treena V. Garrett,**

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

[FR Doc. 2020-26327 Filed 11-30-20; 8:45 am]

**BILLING CODE 6450-01-P**

## FEDERAL TRADE COMMISSION

### 16 CFR Parts 801, 802 and 803

**RIN 3084-AB46**

### Premerger Notification; Reporting and Waiting Period Requirements

**AGENCY:** Federal Trade Commission.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) is issuing this advance notice of proposed rulemaking (“ANPRM”) to gather information, related to seven topics, that will help to determine the path for future amendments to the premerger notification rules (“the Rules”) under the Hart-Scott-Rodino Antitrust Improvements Act (“the Act” or “HSR”).

**DATES:** Comments must be received on or before February 1, 2021.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “16 CFR parts 801–803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014” on your comment. File your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610, (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Robert Jones (202–326–3100), Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC-5301, Washington, DC 20024.

### SUPPLEMENTARY INFORMATION:

#### Invitation to Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 1, 2021. Write “16 CFR parts 801–803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID–19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “16 CFR parts 801–803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610, (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential,”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies



the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](http://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before February 1, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see* <https://www.ftc.gov/site-information/privacy-policy>.

## Overview

The Act and Rules require the parties to certain mergers and acquisitions to file notifications with the Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“the Assistant Attorney General”) (collectively, “the Agencies”) and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable the Agencies to determine whether proposed mergers or acquisitions may violate the antitrust laws if consummated and, when appropriate, to seek injunctions in federal court to prohibit anticompetitive transactions prior to consummation.

Section 7A(d)(1) of the Clayton Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Clayton Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C.

553, the authority to define the terms used in the Act, exempt classes of transactions that are not likely to violate the antitrust laws, and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

Since the enactment of the Act, the Commission has updated and refined the Rules many times. Indeed, the Agencies have a strong interest in making sure the Rules are as current and relevant as possible. Certain rules interpreting and implementing the Act, some of which have not been changed since they were first promulgated in 1978, may need additional updating. In this ANPRM, the Commission proposes to gather information on seven topics to help determine the path for potential future amendments to numerous provisions of Parts 801, 802, and 803 of the Rules under the Act.

## Background

Although it regularly reviews the Rules and revises them on a rolling basis, the Commission is issuing this ANPRM to solicit information to support review of the Rules on a more unified basis as part of its systematic review of all FTC rules and guides. The Commission is aware that market and business practices are constantly evolving, and that these changes make it especially important to evaluate whether the Rules are still serving their intended purpose or if they need to be amended, eliminated, or supplemented.

To accomplish this, the Commission is publishing in this ANPRM a number of questions related to seven different topics about which questions frequently arise in discussions of the Rules: Size of Transaction, Real Estate Investment Trusts, Non-Corporate Entities, Acquisitions of Small Amounts of Voting Securities, Influence outside the Scope of Voting Securities, Devices for Avoidance, and Filing Issues. Answers to questions on these topics will provide information that may facilitate drafting of new or revised rules.

The Commission welcomes comments on all of these topics, or on any subtopic within them. The Commission, however, does not expect that every commenter will address all seven topics, or even every question relating to each topic. The Commission notes that comments it receives in response to this ANPRM may also inform the Notice of Proposed Rulemaking regarding the proposed change in the § 801.1(a)(1) definition of “person” and proposed exemption § 802.15 published in the **Federal Register** at the same time as this ANPRM.

## I. Size of Transaction

Section 7A(a)(2) of the Clayton Act mandates an HSR filing when a transaction meets the Size of Transaction (“SOT”) test, subject to other provisions of the Rules, including exemptions.<sup>1</sup> To determine whether a transaction meets the SOT test, filing parties must look to Acquisition Price (“Acquisition Price”) under 16 CFR 801.10 or, in some cases, Fair Market Value (“FMV”) under 16 CFR 801.10(c)(3). As it is the filing parties' responsibility to conduct these calculations, the Commission would benefit from additional information on how filing parties engage in the calculation for both Acquisition Price and FMV.

### A. Acquisition Price (16 CFR 801.10)

Under 16 CFR 801.10(c)(2), the Acquisition Price “shall include the value of all consideration for such voting securities, non-corporate interests, or assets to be acquired.”<sup>2</sup> The FTC's Premerger Notification Office (“the PNO”) has long taken the position that, when a transaction has a determined Acquisition Price, debt may be excluded from the Acquisition Price in certain circumstances. For example, if a buyer pays off a target's debt as part of the transaction, the buyer may deduct the amount of the retired debt from the Acquisition Price. This position dates from the earliest days of interpreting the HSR Rules in the late 1970s and early 1980s and is based, in part, on the analysis of a target's balance sheet liabilities in the context of an acquisition of voting securities.

The PNO has also allowed the deduction of certain expenses when calculating the Acquisition Price. For example, where the purchase price in the parties' transaction agreement includes funds earmarked to pay off the seller's transaction expenses, the PNO has permitted the parties to deduct that amount when calculating the Acquisition Price based on the view that such payments do not reflect consideration for the target.

The Commission is aware that these informal PNO staff positions can have a significant impact on the calculation of the Acquisition Price and, in turn, on whether a transaction is reportable under the Act. Given the potential for these positions to affect the structure of a transaction, the Commission believes

<sup>1</sup> *Steps for Determining Whether an HSR Filing is Required*, FTC.GOV, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing> (last visited July 07, 2020).

<sup>2</sup> 16 CFR 801.10(c)(2).

these informal PNO staff positions may need revision. As a result, the Commission aims to understand the decision-making involved in the deduction of retired debt or other amounts or categories of expenses from the Acquisition Price through responses to the following questions:

1. When negotiating a transaction, does a buyer ever offer to pay off or retire debt as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s?

a. Why might a buyer offer to pay off or retire debt as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

b. Why might a buyer decline to pay off or retire debt as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

c. Does a seller prefer a buyer that is willing to pay off or retire debt as part of the deal? Why or why not? Are seller preferences different now than in the late 1970s/early 1980s?

d. In a multiple bid situation, is a buyer's willingness to pay off or retire debt as part of the deal ever a factor in the seller's selection of the winning bid? Was it a factor in the late 1970s/early 1980s? And if it is evaluated differently today versus the 1970s/early 1980s, why is it evaluated differently?

e. Do sellers ever reject a buyer's offer to pay off or retire debt as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

f. Are there any limitations (legal or otherwise) on a buyer's ability to pay off or retire debt as part of the deal? If so, what are they? How do these limitations differ from limitations in place in the late 1970s/early 1980s?

g. Are buyers more or less likely to pay off or retire debt as part of the deal now than they were in the late 1970s/early 1980s? Why or why not?

2. When negotiating a transaction, does a buyer ever offer to pay other expenses of or within the seller (e.g., legal or banking fees, change of control payments, etc.) as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s?

a. Why might a buyer offer to pay such expenses as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive

implications of the deal ever been a factor in this decision?

b. Why might a buyer decline to pay such expenses as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

c. Does a seller prefer a buyer that is willing to pay such expenses as part of the deal? Why or why not? Are seller preferences different now than in the late 1970s/early 1980s?

d. In a multiple bid situation, is a buyer's willingness to pay such expenses as part of the deal ever a factor in the seller's selection of the winning bid? Was it a factor in the late 1970s/early 1980s? If it is evaluated differently today versus the 1970s/early 1980s, why is it evaluated differently?

e. Do sellers ever reject a buyer's offer to pay such expenses as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

f. Are there any limitations (legal or otherwise) on a buyer's ability to pay such expenses as part of the deal? If so, what are they? Do these limitations differ from limitations in place in the late 1970s/early 1980s? If they differ, how do they differ?

g. Are buyers more or less likely to pay such expenses as part of the deal now than they were in the late 1970s/early 1980s? Why or why not?

3. How do parties currently calculate the Acquisition Price? How has the calculation changed since the late 1970s/early 1980s?

a. Under what conditions is the Acquisition Price different from the purchase price or consideration identified in the transaction agreement? Have these conditions changed since the late 1970s/early 1980s? If they have changed, how have they changed?

b. Do transaction agreements ever lack a firm or certain purchase price? Under what conditions? Have these conditions changed since the late 1970s/early 1980s? If they have changed, how have they changed?

i. Why would parties negotiate a deal without a firm or certain purchase price? What factors have affected such a decision or deal structure? Have these factors evolved since the late 1970s/early 1980s? If they have changed, how have they changed? Have the competitive implications of the deal ever been a factor in this negotiating a deal without a firm or certain purchase price?

ii. What are the limits on the scope of the undetermined payments or

deductions? Have these limits changed since the late 1970s/early 1980s? If they have changed, how have they changed?

c. Can an Acquisition Price be subject to undeterminable deductions or deductions of undeterminable value? Under what conditions? Have these conditions evolved since the late 1970s/early 1980s? If they have changed, how have they changed? What are some examples of each kind of deduction and how have they changed since the late 1970s/early 1980s?

d. Are there certain categories of consideration that are commonly deducted or added when calculating the Acquisition Price? Have these categories changed since the late 1970s/early 1980s? If they have changed, how have they changed?

e. Is the ultimate recipient of a payment ever a factor in whether such payment is included when calculating the Acquisition Price? Why or why not? In what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

f. Is employee compensation (e.g., bonus payments, retention payments, payments for contingent employee compensation) ever included when calculating the Acquisition Price? Why or why not? In what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

g. Does the form of employee compensation affect whether it is included in the Acquisition Price? Under what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

h. Is the value of employee compensation ever deducted from the Acquisition Price? Why or why not? Under what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

i. Is there a "control premium" associated with the acquisition of control? How does an Acquiring Person determine that "control premium"? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

4. When calculating the Acquisition Price, do parties include all consideration paid for the target? How has this approach changed since the late 1970s/early 1980s?

a. How do parties define "consideration?" Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

b. Do parties rely on a standard legal definition for "consideration?" If so,

what is it and from what is it derived? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

c. Is consideration defined any differently for the purposes of calculating Acquisition Price than it is for non-HSR purposes? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

d. Are any categories of payments excluded from the above definition of "consideration"? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

e. Is the ultimate recipient of the payment ever a factor in whether such payment is included as consideration? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

5. When calculating the Acquisition Price, how does debt affect the calculation? How has this approach changed since the late 1970s/early 1980s?

a. Does the debt reported on the target's balance sheet affect the calculation of the Acquisition Price? Why or why not? In what circumstances? Should it? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

b. Does the buyer's pay off or retirement of debt affect the calculation of the Acquisition Price? Why or why not? In what circumstances? Should it? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

c. Does the treatment of debt (either reported on a balance sheet or being paid off or retired by the buyer) differ based on whether the acquisition is of (1) voting securities, (2) non-corporate interests, or (3) assets? Why or why not? Should it? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

d. Should the calculation of Acquisition Price focus on the total amount paid by the Acquiring Person (including debt that is paid off or retired) or the net amount received by the Acquired Person (excluding debt that is paid off or retired)? Why? Has this changed since the late 1970s and early 1980s? If it has changed, how has it changed?

6. Where an acquisition is of voting and non-voting securities, how is the Acquisition Price allocated between the voting securities and the non-voting securities? How has this approach

changed since the late 1970s/early 1980s?

a. Are the voting securities and non-voting securities separately valued? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

b. Are each of the voting securities and the non-voting securities valued? Why or why not? Has this changed since the late 1970s and early 1980s? If it has changed, how has it changed?

#### *B. Fair Market Value (16 CFR 801.10(c)(3))*

Sometimes a transaction does not have a determined Acquisition Price. This is often due to the fluctuation in stock prices or the inability to calculate the exact amount of contingent future payments. As a result, the Fair Market Value ("FMV") of the transaction becomes critical to determining reportability under the Act.

Per § 801.10(c)(3), FMV "shall be determined in good faith by the board of directors of the ultimate parent entity included within the Acquiring Person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials." Once the Acquiring Person, or its delegate, has determined the FMV, there is no requirement to share with the Agencies the details of how that FMV was determined. The Commission would like to understand better the determination of FMV through responses to the following questions:

1. When an Acquiring Person is evaluating the potential acquisition of voting securities, non-corporate interests, or assets, what methodologies does that Acquiring Person use to support valuation in the ordinary course of due diligence and negotiation of the acquisition? How have these methodologies changed since the late 1970s/early 1980s?

a. If an acquisition involves the acquisition of non-voting securities, what methodologies does the Acquiring Person use to value the non-voting securities? Have these methodologies changed since the late 1970s/early 1980s? If they have changed, how have they changed?

b. In an acquisition of both voting securities and non-voting securities, does the Acquiring Person ever use one methodology to value the voting securities and a different methodology to value the non-voting securities? Why or why not? Have these methodologies changed since the late 1970s/early 1980s? If they have changed, how have they changed?

c. Where the Acquiring Person receives board appointment or board designation rights (or their non-corporate equivalent) in conjunction with the acquisition of voting (or non-voting) securities, do those rights affect the FMV of the voting (or non-voting) securities acquired? Has this changed since the late 1970s/early 1980s? If this has changed, how has it changed?

2. How does the determination of FMV under 16 CFR 801.10(c)(3) differ from the Acquiring Person's determination of value in the ordinary course of due diligence and negotiation of an acquisition? How has this determination changed since the late 1970s/early 1980s?

a. What factors go into determining FMV? Do these factors vary by industry, type of acquisition (asset, non-corporate interest, intellectual property), size of the target, or for other reasons? Describe each of the ways these factors vary and how each one varies. How have these factors changed since the late 1970s/early 1980s? Are there difficulties involved in performing FMV analyses? If so, what are those difficulties? Have these difficulties changed since the late 1970s/early 1980s? If they have changed, how have they changed? What additional guidance, if any, might the Commission provide to eliminate these difficulties?

b. How often and for what purposes do boards of directors rely on third-party bankers and other appraisers to provide FMV analysis? Do boards of directors evaluate the accuracy of those results compared to their own calculations? If so, how does the board of directors evaluate the accuracy of those results? Has this process changed since the late 1970s/early 1980s? If it has changed, how has it changed?

c. Should the Commission require an independent FMV analysis for some transactions to ensure consistency with standard valuation practices? If so, for what type of transactions should the Commission require independent FMV analysis? If the Commission requires an independent analysis, who should conduct the FMV analysis?

3. When calculating the FMV because the Acquisition Price is not determined as a result of future or uncertain payments, what financial or valuation concepts are used to determine the value of those future or uncertain payments? Have these concepts changed since the late 1970s/early 1980s? If they have changed, how have they changed?

4. How does an Acquiring Person determine the present FMV of assets that are not yet commercialized? For example, how does an Acquiring Person determine the present FMV of

intellectual property surrounding a product that currently is under development? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

5. In determining the FMV, how does the Acquiring Person account for the value of any assumed liabilities (or liabilities of the Acquired Entity)? What impact do such liabilities have on the FMV? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

6. Should the Commission require the Acquiring Person to provide the basis for its FMV determination? If so, why? If not, why not?

## II. Real Estate Investment Trusts (Section 7A(c)(1) of the Clayton Act)

Congress created real estate investment trusts ("REITs") in 1960 to allow for the pooling of funds from many small investors to invest in real estate, and gave REITs preferential tax treatment. The legislative history indicates that REIT status was meant to be limited to "clearly passive income from real estate investments, as contrasted to income from the active operation of businesses involving real estate," and those real estate trusts engaging in active business operations would not be afforded REIT tax status.<sup>3</sup>

As a result, the PNO has long taken the informal staff position that when a REIT acquires real property (and assets incidental to the real property), the acquisition is exempt from HSR reporting under section 7A(c)(1) of the Clayton Act, the statutory ordinary course of business exemption. This position is based on the presumption that REITs are solely buying, owning, leasing, and selling real property, and therefore any acquisition of real property is exempt because it is done in the ordinary course of the REIT's business and is unlikely to violate the antitrust laws.

The Commission is aware that the Internal Revenue Service ("IRS") subsequently made changes in tax law to remove restrictions on REITs and expand the beneficial tax treatment. As a result, many REITs are no longer solely buying, owning, leasing, and selling real property.<sup>4</sup> In fact, many REITs are now engaged in the active operation of businesses. For instance, REITs operate assisted living and other healthcare businesses, as well as companies that own cell towers and

billboards, located on REIT-owned real property. Due to these changes, the Commission believes it is possible that a REIT's acquisition of real property may no longer be suitable for the blanket exemption offered under section 7A(c)(1) of the Act. The Commission would like to understand in more detail the current structure and operation of REITs through responses to the following questions:

1. Have REITs evolved from entities that own only real property to entities that can hold operating companies?

a. If so, what has led to the evolution of REITs becoming entities that can hold operating companies?

b. How have changes in tax laws or regulations influenced this evolution?

2. How does an operating company convert to a REIT?

a. Do REIT structures involve one Ultimate Parent Entity ("UPE")? Two UPEs? How often is each type used? Why?

b. If a REIT has more than one UPE, what is the relationship between those UPEs?

c. If a REIT has more than one UPE, is there an entity above the UPEs that makes decisions for both of them?

3. Is there a way to distinguish REITs that own only real property from those that hold operating companies? If yes, what are the ways to distinguish REITs that own only real property and those that hold operating companies? For instance, are there differences in how they are structured? How else are they different?

4. Assume the PNO's informal staff position exempting REITs did not exist and REITs had to rely solely on the real property exemptions, §§ 802.2 and 802.5.

a. Are there situations in which REIT transactions would no longer be exempt? If so, what kinds of situations?

b. How often would the §§ 802.2 and 802.5 exemptions come into play?

c. Would it be easy for REITs to apply §§ 802.2 and 802.5 to transactions? If so, why? If not, why not?

## III. Non Corporate Entities (16 CFR 801.1f(1)(ii))

The Act applies to acquisitions of voting securities or assets. The rise of non-corporate entities, such as partnerships and limited liability companies, has presented challenges under the Act because the PNO had long taken the position that interests in unincorporated entities were neither voting securities nor assets. Thus, any acquisition of interests in such entities had not been a reportable event unless 100% of the interests was acquired, in which case the acquisition was deemed

to be that of all of the underlying assets of the partnership or other unincorporated entity."<sup>5</sup>

At first, this approach did not present significant issues, because non-corporate entities were created as acquisition vehicles and used to effectuate transactions, not to separately hold operating businesses.<sup>6</sup> But the role of non-corporate entities evolved. As the Commission noted in its 2004 Notice of Proposed Rulemaking, "[t]he use of unincorporated entities is expanding, and such entities are increasingly engaging in acquiring interests in other corporate and unincorporated entities. For example, the number of corporate income tax filings increased from 4,630,000 to 5,711,000 (23%) between 1994 and 2002, while the number of partnership returns, including LLCs taxed as partnerships, increased from 1,550,000 to 2,236,000 (44%) during the same period. In addition, a number of states have amended their statutes in recent years to allow limited liability companies to merge with other types of legal entities."<sup>7</sup> As a result, the Commission determined in its 2005 Final Rule that the acquisition of control, 50% or more of the non-corporate interests ("NCIs") in a non-corporate entity ("NCE"), would henceforth be reportable.<sup>8</sup>

The Commission is aware that NCEs have continued to evolve. For instance, acquisitions of NCIs are often captured in Securities Purchase Agreements, which imply that NCIs are now deemed to be more like voting securities. Thus, the Commission believes that it is appropriate to re-evaluate the nature of NCEs and NCIs to determine whether NCEs are the equivalent of corporate entities and NCIs function more as voting securities. To that end, the Commission would like to understand in more detail the evolution of NCEs and NCIs since its 2005 Final Rule,<sup>9</sup> through responses to the following questions:

1. Have NCEs evolved in form and substance since 2005? If they have evolved, what significant changes have occurred to shape the evolution of NCEs between 2005 and now?

a. Have the distinctions between NCEs and corporate entities evolved since 2005? If they have evolved, what significant changes have occurred to make NCEs and corporate entities more or less distinct between 2005 and now?

<sup>5</sup> 69 FR 18686, 18687 (Apr. 8, 2004).

<sup>6</sup> Formal Interpretation 15, 63 FR 54713 (Oct. 13, 1998) (amended 1999) (amended 2001).

<sup>7</sup> 69 FR at 18688.

<sup>8</sup> 70 FR 11502, 11504 (Mar. 8, 2005).

<sup>9</sup> 70 FR 11502 (Mar. 8, 2005).

<sup>3</sup> H.R. Rep. No. 86–2020, pt. 2, at 3–4 (1960).

<sup>4</sup> Proposed Rulemaking, 79 FR 27508 (May 14, 2014); Correction to Proposed Rulemaking, 79 FR 38809 (July 9, 2014); Final Regulations, 81 FR 59849 (Aug. 31, 2016).

b. Have the distinctions between NCIs and voting securities evolved since 2005? If they have evolved, what significant changes have occurred to make NCIs and voting securities more or less distinct between 2005 and now?

c. Are NCIs currently the same as voting securities? If so, how? If not, how are they different? Is this different from 2005? If so, how? What has changed between 2005 and now?

d. Does any category of NCIs currently carry a right equivalent to the right to vote for the election of the board of directors of a corporate entity? Is this different from 2005? If so, how? What has changed between 2005 and now?

e. Should the reporting obligations for the acquisition of an interest in a corporate entity and non-corporate entity differ? Is this different from 2005? If so, how? What has changed between 2005 and now?

2. Have the benefits and drawbacks of becoming an NCE evolved since 2005? If they have evolved, have the incentives to become an NCE changed since 2005? If so, how? If not, why not? What has changed between 2005 and now?

#### IV. Acquisitions of Small Amounts of Voting Securities (16 CFR 801.1, 802.9, 802.64)

Since the implementation of the HSR program, there has been a significant expansion of the holdings of investment entities, including investment funds and institutional investors, as well as expanded interest and ability of such shareholders to participate in corporate governance.<sup>10</sup> In addition, changes in investment behavior have resulted in some investment entities holding small stakes in a large number of firms, including competitors. This has caused some to raise concerns about the competitive effects of common ownership—that is, the competitive effect of an investor holding small minority positions in issuers that operate competing lines of business.<sup>11</sup>

<sup>10</sup> See, e.g., Edward Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. Pa. L. Rev. 1907 (2013).

<sup>11</sup> Matthew Backus, Christopher Conlon, & Michael Sinkinson, *Common Ownership in America: 1980–2017*, forthcoming, American Economic Journal (forthcoming 2020) [https://chrisconlon.github.io/site/common\\_owner.pdf](https://chrisconlon.github.io/site/common_owner.pdf). (These concerns (and their validity) were discussed at the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Hearings on Common Ownership (Dec. 6, 2018). The transcript of that session is available on the FTC's website, here: [https://www.ftc.gov/system/files/documents/public\\_events/1422929/ftc\\_hearings\\_session\\_8\\_transcript\\_12-6-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_events/1422929/ftc_hearings_session_8_transcript_12-6-18_0.pdf), and the slide presentations of the participants are available here, [https://www.ftc.gov/system/files/documents/public\\_events/1422929/cpc-hearings-nyu\\_12-6-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1422929/cpc-hearings-nyu_12-6-18.pdf)).

In light of these developments, the Commission is using this ANPRM to take a fresh look at the rules that apply to acquisitions of voting securities by investment entities to determine whether updates may be necessary. The Commission seeks information on the following rules:

##### A. Definition of “Solely for the Purpose of Investment” (16 CFR 801.1, 802.9)

Section (c)(9) of the HSR Act exempts from the requirements of the Act “acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer.” To implement this statutory limitation, 16 CFR 802.9 exempts from the requirements of the Act an acquisition of voting securities if made solely for the purpose of investment and if, as a result of the acquisition, the Acquiring Person would hold 10% or less of the outstanding voting securities of the issuer, regardless of the dollar value of the voting securities so acquired or held. Under 16 CFR 801.1(i)(1), “[v]oting securities are held or acquired ‘solely for the purpose of investment’ if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>12</sup>

In light of changing investor engagement with issuers, the Commission is interested in knowing if it is appropriate to rethink the definition of “solely for the purpose of investment” in 16 CFR 801.1(i)(1) and the exemption in 16 CFR 802.9. To that end, the Commission seeks to understand the incentives involved in applying the exemption in 16 CFR 802.9 through responses to the following questions:

1. The ability to rely on 16 CFR 802.9 depends on whether a potential filing person “has no intention of participating in the formulation, determination, or direction of basic business decisions of the issuer.”<sup>13</sup>

a. Are there benefits to this approach? If so, what are the benefits?

b. Are there drawbacks to this approach? If so, what are the drawbacks?

c. How could this approach be changed? How would such a change impact investors and issuers?

d. What are the “basic business decisions” of the issuer?

i. Is it clear what decisions comprise the “basic business decisions” of the issuer?

ii. Are there activities that clearly do not relate to the basic business decisions?

iii. Are there activities that clearly do relate to the basic business decisions?

iv. Is there uncertainty about whether an activity relates to the basic business decisions? If so, why is there uncertainty? To what extent is there uncertainty about whether an activity relates to the basic business decisions?

e. Should the Commission define the “basic business decisions of the issuer” as used in the existing Rule?

i. What should the definition include?

ii. Should specific items be excluded from the definition? Which items?

iii. What are the benefits of providing a definition?

iv. What are the risks of providing a definition?

f. Is it clear what is meant by “no intention of participating” in the formulation, determination, or direction of the basic business decisions?

i. What type of activity related to determining whether to participate in business decisions currently takes one out of the exemption, or at what point in the process of deciding whether to participate in business decisions is one no longer within the exemption?

ii. What type of activity related to determining whether to participate in business decisions should result in the exemption no longer applying, or at what point in the process of deciding whether to participate in business decisions should one no longer be within the exemption?

iii. Should the language be changed to allow reliance on the exemption until the Acquiring Person has made an affirmative decision to participate in the basic business decisions? If so, what would constitute an affirmative decision to participate in the basic business decisions?

2. In general, for HSR purposes, what differentiates the activities of investors who invest solely for the purpose of investment and investors who do not invest solely for the purpose of investment? Have these activities changed since 1978? If so, how?

a. In what activities do investors who invest solely for the purpose of investment engage? Have these activities changed since 1978? If so, how?

b. What categories of interaction with management indicate an investor's intention is not to hold voting securities solely for the purpose of investment? For example, would those categories include things like discussions of governance issues, discussions of

<sup>12</sup> 16 CFR 801.1(i)(1).

<sup>13</sup> 16 CFR 801.1(i)(1).

executive compensation, or casting proxy votes? Have these categories changed since 1978? If so, how?

c. Does the market capitalization of the issuer affect the determination of whether an investment is solely for the purpose of investment or not solely for the purpose of investment? Has this changed since 1978? If so, how?

3. How does the Commission's interpretation of "solely for the purpose of investment" compare to the Securities and Exchange Commission's ("SEC") approach to "passive" investors?<sup>14</sup>

a. Assuming no change in the SEC approach, could the Commission adopt the SEC approach? If yes, why? If no, why not?

b. What would be the benefits of adopting the SEC approach? Why?

c. What would be the drawbacks of adopting the SEC approach? Why?

d. Does the different role of each agency justify different approaches for investors who hold positions solely for the purpose of investment? If yes, why? If no, why not?

4. How does the Commission's interpretation of "solely for the purpose of investment" compare to the elements that must be disclosed in Item 4 of Schedule 13D filed with the SEC?<sup>15</sup>

a. Assuming no change to the SEC rule, could the Commission adopt the SEC elements? If yes, why? If no, why not?

b. What would be the benefits of adopting the SEC elements?

<sup>14</sup> Under SEC Rule 13d-1(c), certain beneficial owners may file a short form statement on Schedule 13G in lieu of a 13D statement if that person "has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to 17 CFR 240.13d-3(b), other than activities solely in connection with a nomination under 17 CFR 240.14a-11." 17 CFR 240.13d-1(c). The SEC relies on a "control purpose" test to identify "passive" investments; that is, beneficial owners that acquired shares "not with the purpose nor with the effect of changing or influencing the control of the issuer." The SEC has a broad view of the types of activities that could show such a "control purpose," and that determination is assessed based on a totality of the circumstances. For instance, a shareholder that fails to qualify as an investor solely for the purpose of investment under the HSR Act may nonetheless be eligible to use Schedule 13G depending on various factors, such as the subject matter of the shareholder's discussions with the issuer's management. See Exchange Act Sections 13(d) and 13(g) and Regulation 13D—G Beneficial Ownership Reporting, Compliance and Disclosure Interpretations ("C&DIs"), Question 103.11 (July 14, 2016) <https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm#103.11>.

<sup>15</sup> Item 4 of Schedule 13D requires filers to state the purpose or purposes of the acquisition of securities of the issuer and to describe any plans or proposals which they might have. 17 CFR 240.13d-10117 CFR 240.13d-101.

c. What would be the drawbacks of adopting the SEC elements?

d. Does the different role of each agency justify different approaches for investors who hold positions solely for the purpose of investment?

5. How do the activities of investment firms differ from those of operating companies?

a. Should the Commission treat different types of acquirers differently for the purpose of the exemption? If yes, why? If no, why not?

b. Should the Commission treat different types of investment companies differently for the purpose of the exemption (for example, mutual fund companies versus hedge fund companies)? If yes, why? If no, why not?

6. Should the Commission preclude parties from using the exemption only if they have taken certain specified actions? If yes, why? If no, why not?

a. What actions should disqualify an Acquiring Person from being able to use the exemption?

i. Should the actions be limited to actions that facilitate or encourage coordination among competitors?

ii. Should actions that affect competition, even if aimed only at a single competitor, preclude the use of the exemption? If yes, why? If no, why not?

iii. Should actions that change the incentives to compete, even if aimed only at a single competitor, preclude the use of the exemption? If yes, why? If no, why not?

iv. What other actions should preclude utilizing the exemption?

b. Would allowing the Acquiring Person to acquire 9.9% of the voting securities of the Issuer prior to taking the specified action undercut the ability to obtain filings early enough to ascertain potential competitive harm before a transaction is consummated? If yes, why? If no, why not?

c. Would such a conditioning of the loss of the exemption be consistent with the wording of the statute, including "solely" and the "purpose" of the acquisition? If yes, why? If no, why not?

i. Is the acquisition *solely* for investment if the Acquiring Person is considering taking action inconsistent with the exemption, but has not yet taken the action?

ii. Is the acquisition for the *purpose* of investment if the Acquiring Person has determined to take action inconsistent with the exemption, but has not yet taken the action?

d. Should the Commission require an HSR filing for past acquisitions once the specified actions have been taken? If yes, why? If no, why not?

i. Would this be consistent with the HSR Act's requirement to make the

filing prior to the acquisition? If yes, why? If no, why not?

ii. Would this be consistent with the requirement that the Acquiring Person certify that it has a good faith intent to make an acquisition requiring notification? If yes, why? If no, why not?

#### *B. Definition of Institutional Investors (16 CFR 802.64)*

Under § 802.64, institutional investors are exempt from HSR reporting when making acquisitions of 15% or less of voting securities in the ordinary course of business and solely for purpose of investment. During the initial HSR rulemaking in 1978, entities were identified as institutional investors because they were viewed as constrained by law (e.g., non-profits) or fiduciary duty (e.g., pension trusts, insurance companies, etc.), or generally uninterested in "affecting management of the companies whose stock they buy" (e.g., broker-dealers).<sup>16</sup> The list identifying what type of entity is considered an institutional investor has never been updated.

It is unclear to the Commission whether this exemption should be maintained and implemented in the same manner in which it was first promulgated in 1978. In light of changes in the investor landscape since that time, the Commission may need to update the list of institutional investors that are presumed to engage in acquisitions solely for the purpose of investment. Thus, the Commission aims to understand the current institutional investor landscape in order to make that determination through responses to the following questions:

1. Given that 16 CFR 802.64 has not changed since 1978, does it need to be updated?

a. Does 16 CFR 802.64 accurately reflect the universe of entities that make investments in the ordinary course of business solely for the purpose of investment? Are there entities currently listed in the exemption that should be removed? If so, why?

b. Are there entities not currently listed that should be treated as institutional investors? If so, why and what are they? Explain the justification for treating the entity as an institutional investor: Does it fit within the paradigm identified by the Commission in first promulgating 16 CFR 802.64 (i.e., (i) constrained by law; (ii) constrained by fiduciary duty; or (iii) uninterested in affecting management of the companies whose stock they buy)? Are there other reasons the entity should be treated as an institutional investor?

<sup>16</sup> 43 FR 33450, 33503 (July 31, 1978).

c. Should the Commission provide a list of indicia that an investor must meet to qualify as an institutional investor for purposes of the HSR Act, instead of a list of entities considered to be institutional investors? If yes, why and what should these indicia be? If no, why not?

d. Is the 15% level for the Commission's exemption still consistent with the purpose of the HSR Act? What evidence is there that the level should be higher or lower?

The SEC has also promulgated a definition of "institutional investors" as part of its beneficial ownership disclosure requirements. When a person or group of persons acquires beneficial ownership of more than five percent of a voting class of a company's equity securities registered under the Securities Exchange Act, they are required to file a Schedule 13D with the SEC.<sup>17</sup> Depending upon the facts and circumstances, the person or group of persons may be eligible to file the more abbreviated Schedule 13G in lieu of Schedule 13D.<sup>18</sup> One of the exemptions relates to acquisitions of securities in the ordinary course of business by a "qualified institutional investor" under Rule 13d-1(b).<sup>19</sup>

2. How does the Commission's definition of institutional investor compare to the definition used by the SEC in identifying a person able to file a Schedule 13G?

a. Assuming no change in the SEC rule, should the Commission adopt the SEC definition of a person who acquires voting securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer? If yes, why? If no, why not?

b. What would be the benefits of adopting the SEC definition?

c. What would be the drawbacks of adopting the SEC definition?

d. Does the different role of each agency justify different definitions for institutional investors?

3. What are the activities of institutional investors and how have they changed since 1978?

a. What activities do institutional investors engage in with the issuers whose shares they hold? Have these activities changed since 1978? If so, how have these activities changed?

i. What is the scope of "shareholder engagement" that institutional investors undertake? Has this changed since 1978? If so, how has it changed?

ii. What topics or issues are the subject of such engagement? Have these topics or issues changed since 1978? If so, how have they changed?

iii. How often does such engagement occur? Has this changed since 1978? If so, how has this changed?

iv. Does the amount, degree, or type of issue discussed vary by issuer, or are there consistent themes of discussion and engagement? Has this changed since 1978? If so, how has this changed?

v. When do institutional investors participate in the formulation, determination, or direction of the basic business decisions of issuers? Has this changed since 1978? If so, how has it changed?

b. How do index funds fit within the portfolios of institutional investors? Have index funds evolved since 1978? If so, how have they evolved?

i. Why do institutional investors choose to create an index fund, exchange-traded fund, or the like? What are the benefits and drawbacks of creating such a fund?

ii. How does the acquisition of voting securities held by an index fund, exchange-traded fund, or the like occur? Do acquirors use an algorithm or some other automated mechanism to facilitate acquisitions?

iii. Who oversees an index fund, exchange-traded fund, or the like? Is there one person or entity within an investment organization tasked with overseeing such a fund? More than one? How often is it one versus more than one?

4. How do institutional investors manage holdings in the same issuer? How has this changed since 1978?

a. Do institutional investors jointly manage holdings in the same issuer? Do they separately manage holdings in the same issuer? Both? Has this changed since 1978? If so, how has it changed?

b. How do institutional investors make the decision to jointly or separately manage holdings in the same issuer? Has this changed since 1978? If so, how has this changed?

c. Do answers to any of the above questions depend on the type of issuer or the type of institutional investor or other factors? If so, what factors are relevant? How does each factor influence the actions of institutional investors? Have the factors changed since 1978? If so, how have they changed?

5. How do institutional investors apply the concept of solely for the purpose of investment? Has this

changed since 1978? If so, how has it changed?

a. Do the entities listed in 16 CFR 802.64 currently hold the voting securities of issuers solely for the purpose of investment? How does this differ from institutional investor behavior in 1978? What significant changes in institutional investor behavior have occurred between 1978 and 2020?

b. What kinds of entities not listed in 16 CFR 802.64 currently hold the voting securities of issuers solely for the purpose of investment? How does the current behavior of these entities differ from their behavior in 1978?

c. If institutional investors make certain acquisitions solely for the purpose of investment and other acquisitions not solely for the purpose of investment, is it appropriate to provide a status exemption for all of their activities? If yes, why? If no, why not?

d. Do institutional investors rely on 16 CFR 802.64 to exempt acquisitions in or by index funds, exchange-traded funds or the like? If so, how?

## **V. Influence Outside the Scope of Voting Securities (16 CFR 801.1, 802.31)**

The HSR Act applies to the acquisition of assets and voting securities. "The term voting securities means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer."<sup>20</sup> The acquisition of a voting security carries with it the right to influence the business of a company through the ability to vote for the directors of that company, among other things.

The Commission is aware, however, that there are ways to gain influence over a company without the acquisition of the right to vote for the election of directors inherent in voting securities. For instance, the acquisition of convertible voting securities or the use of board observers could each result in the ability to influence a company's business decisions. Currently, neither the acquisition of convertible voting securities nor rights to be a board observer are reportable events under the Act. The Commission, therefore, needs to ascertain whether the acquisition and exercise of these rights provide opportunities to influence an issuer's business decisions, and thus should be reportable events.

<sup>17</sup> Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and 17 CFR 240.13d-101.

<sup>18</sup> Section 13(g) was added to the Exchange Act as part of the Domestic and Foreign Investment Improvement Disclosure Act of 1977. Public Law 95-214, sec. 203, 91 Stat. 1494.

<sup>19</sup> Under SEC Rule 13d-1(b)(1)(i)-(ii)(A)-(K), certain beneficial owners may file a short form statement on Schedule 13G in lieu of a 13D statement under certain conditions.

<sup>20</sup> 16 CFR 801.1(f)(1)(i).



### A. Convertible Voting Securities (16 CFR 802.31)

The acquisition of convertible debentures (convertible into common stock), options, warrants, or preferred shares, even with no present right to vote for directors, may result in the ability to influence the business of a company. The Rules capture these kinds of stakes in the concept of a convertible voting security. “The term convertible voting security means a voting security which presently does not entitle its owner or holder to vote for directors of any entity.”<sup>21</sup> Section 802.31 exempts the acquisition of convertible voting securities.

The PNO has taken the informal position that the acquisition of convertible voting securities, when accompanied by the right to designate or appoint individuals to the board of directors of the issuer equal to the percentage of voting securities that would be held upon conversion, is reportable under the Act. The Commission is considering revising § 802.31 to explicitly require compliance with the HSR Act’s reporting requirements when the acquisition of convertible voting securities is coincident with the Acquiring Person having or obtaining the right to designate or appoint any individuals to the board of the issuer. The Commission aims to understand the potential benefits and burdens of such a change through responses to the following questions:

1. Is the acquisition of convertible voting securities, when accompanied with the right of appointment or designation of individuals to the issuer’s board of directors, equivalent to the acquisition of voting securities with the present right to vote for election of the issuer’s board of directors? In what ways are they the same and in what ways are they different? What provisions could accompany the right to appoint that would make the acquisition the most like an acquisition of voting securities? What provisions make them different for competition purposes? Have these provisions changed since 1978? If so, how have they changed?

2. Why would an Acquiring Person choose one alternative over the other? Have the benefits of one alternative over another changed since 1978?

a. Is there a benefit of acquiring convertible voting securities while holding or obtaining the right to appoint or designate individuals to an issuer’s board of directors, as compared to the acquisition of securities that have the

present right to vote? If so, what is the benefit? Has the benefit changed since 1978? If so, how has it changed?

b. Under what situations does such a benefit arise? Have these situations changed since 1978? If so, how have they changed?

3. What are the reasons the Commission should or should not require a filing whenever the acquirer of convertible non-voting securities receives a right to designate one or more directors prior to conversion?

a. Should issuers that have cumulative voting be subject to the same requirements as issuers that do not have cumulative voting? Why should they be subject to different requirements? Is there a difference in how much influence an acquirer would have based on whether the issuer has cumulative voting? Why? How would the Commission be able to distinguish when it is a problem and when it is not?

4. What would be the burden associated with this possible change?

a. Would the burden fall most on an identifiable class of transactions? How would such a change affect how an identifiable class of transactions is structured?

b. Would such a change introduce significant inefficiencies into the market for corporate control? What would be the effect of that change in the market?

### B. Board Observers

Another potential way to gain influence over a company, beyond the scope of acquiring voting securities, is through board observers. The Commission understands that it is becoming increasingly common for issuers and NCEs to include board observers as part of their governance structure. Issuers and NCEs often grant rights to select and appoint board observers to investors with significant equity, in addition to or in lieu of providing investors with board seats. Even though board observers lack the ability to vote on matters that come before the issuer’s board, they may nevertheless have significant influence over the outcome of matters submitted to the board for approval.<sup>22</sup> At the very least, board observers gain insight into an issuer’s strategic decision-making, which is not only useful to the investor sponsoring the board observer, but may also be useful to competitors in the market, especially when those board observers also serve as officers or directors of a competitor.<sup>23</sup> Companies

likely benefit from interacting with board observers because company management can obtain additional investor insight without having to alter the composition or voting balance on the board.

Given the opportunities that board observers have to interact with corporate officers, directors, and other managers, and to gain access to confidential information related to strategic and operational decisions, the Commission would like to better understand the role of board observers. In particular, the Commission would like to know how investors might use board observers’ rights to influence competitive decision-making of issuers and NCEs to ascertain whether the acquisition of rights that provide opportunities to wield this kind of influence should be reportable under the Act. To that end, the Commission seeks responses to the following questions:

1. What types of information are available to an issuer/NCE board observer?

a. With what frequency is a board observer invited to all meetings? Is a board observer always entitled to all info provided to board members? Is a board observer permitted to request additional information beyond what is presented at a board meeting? If so, with what frequency?

b. Are board observers subject to any restrictions on how they can use the information they obtain in their capacity as board observers? Are these restrictions based on contract, bylaws or regulations?

c. Do issuers/NCEs create formal review processes for information scheduled to be sent to a board observer? If so, with what frequency? Are outside counsel involved in monitoring compliance? If so, with what frequency?

d. Is the information scheduled to be sent to a board observer subject to a non-disclosure agreement that limits its dissemination to others, including officers and directors of competitors or investors in competitors?

e. Do issuers/NCEs draft formal guidance for their boards as to what topics should not be discussed in the presence of board observers? If so, with what frequency? Are outside counsel involved in monitoring compliance? If so, with what frequency?

2. What means does an issuer/NCE board observer have to influence board policies or the strategic or operational direction of the firm?

<sup>22</sup> *Obasi Investment Ltd. et al. v. Tibet Pharmaceuticals, Inc. et al.*, 931 F.3d 179, 183 (3d Cir. 2019).

<sup>23</sup> See Complaint, *In re Altria Group/JUUL Labs*, Dkt. 9383, ¶ 9, at [https://www.ftc.gov/system/files/](https://www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf)

[documents/cases/d09393\\_administrative\\_part\\_iii\\_complaint-public\\_version.pdf](https://www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf).

<sup>21</sup> 16 CFR 801.1(f)(2).



a. Does a board observer ever enjoy any special right of notice or consultation regarding major capital expenditures or strategic decisions?

b. Does a board observer have access, outside of board meetings, to managers in the corporation, to investment committee members in an NCE, or to persons with similar decision-making roles regarding the operations of the business? If so, with what frequency?

c. Do board observers have the ability to request a meeting of the issuer's/ NCE's board? If so, with what frequency?

d. Do issuers/NCEs impose restrictions on a board observer's speaking role during board meetings? If so, with what frequency? How common are "silent" board observers?

e. How frequently do board observers move into senior executive roles at issuers/NCEs?

3. What are the parameters of the board observer role?

a. Is a board observer's relationship with the issuer/NCE always explicitly defined in a written agreement between the issuer and the investor? How common are informal board observer arrangements?

b. Are board observers (or those who sponsor their observation of board matters) covered by conflict of interest rules or black-out periods such as those that limit investments by board members?

4. Are there any protocols on selection/approval of board observers and/or processes in place to ensure that observers are not in a position to facilitate sharing of competitively sensitive information among competitors?

5. For all of the questions above, do rules or practices regarding board observer rights to obtain confidential information differ substantially between issuers and NCEs? What factors account for any such differences?

## VI. Transactions or Devices for Avoidance (16 CFR 801.90)

16 CFR 801.90 provides that the Commission must disregard the structure of transactions or devices used by the parties for the purpose of avoiding the HSR Act requirements and review the substance of the transaction as a whole to determine whether an HSR filing is required. The PNO often receives questions about whether specific scenarios would be violations under § 801.90, and the PNO has occasionally offered informal staff positions on § 801.90. For instance, the PNO has an informal staff position that says if a target makes a payout prior to its acquisition in the form of an

extraordinary dividend, such a payment would not trigger 16 CFR 801.90 if, as a result of the dividend, the target no longer meets the size of person test.<sup>24</sup> The PNO's informal staff position is based on the idea that if an extraordinary dividend reduces the target's cash on hand, it is unlikely to present a 16 CFR 801.90 issue.

But there are situations where the purpose of such a payout may be more complicated. For instance, if the payout involves more than the distribution of cash on hand, this could present an issue under 16 CFR 801.90. Each issuance of an extraordinary dividend or like payment must be carefully analyzed to make sure that it is not a device for avoidance under § 801.90. The Commission has questions about whether filing parties are engaging in this analysis or, instead, assuming that every extraordinary dividend is not a device for avoidance under § 801.90. In order to determine which are and are not devices for avoidance, the Commission would therefore like to understand the mechanisms by which targets engage in these and other kinds of practices through responses to the following questions:

1. What mechanisms do targets use to pay out extraordinary dividends and what are the reasons for such dividends?

a. Is the focus on the reduction of cash on hand or are there other motivations for issuing such dividends? If so, what are the other motivations?

b. Are there other ways of structuring extraordinary dividends? If so, what are they? If not, why not?

c. How often do targets issue extraordinary dividends in advance of being acquired? What are the reasons that targets issue such dividends?

d. Is the buyer ever involved in the target's decision to issue an extraordinary dividend in advance of an acquisition? Why or why not?

2. Do targets use mechanisms other than extraordinary dividends to reduce cash on hand?

a. If so, what are they and how are they structured? If not, why not?

b. Is the buyer involved? If yes, why and with what frequency? If not, why not?

3. What other actions should the Commission scrutinize as possible devices for avoidance?

## VII. Filing Issues (16 CFR 802.21, 16 CFR Part 803 Appendix A and B)

The Commission has a strong interest in an HSR filing process and an HSR

Form that garners competitively significant information to assist the Agencies in their review of transactions. To that end, the Commission intends to explore amending (a) the 16 CFR 802.21 five-year period during which a party may acquire additional voting securities without refiling, and (b) the requirement in Item 8 of the HSR Form to disclose certain prior acquisitions.

### A. Acquisitions of Voting Securities That Do Not Cross the Next Threshold (16 CFR 802.21)

Under 16 CFR 802.21, filing parties have five years from the end of the waiting period to acquire additional voting securities without making another filing, as long as the additional acquisitions do not exceed the next threshold. For instance, Party A files to cross the \$100 million threshold (as adjusted) on January 1 and receives early termination on January 20, which ends the waiting period. Party A then has five years from January 20 to continue to acquire voting securities of the same issuer up to the next threshold, in this case \$500 million (as adjusted), as long as it crosses the \$100 million threshold (as adjusted) within one year.

The time period in proposed § 802.21 was 180 days, but numerous comments persuaded the Commission this time period was too short.<sup>25</sup> In the final rules, the Commission chose a period of five years, both as a result of these comments and because it made sense to correlate the timing of the exemption with the timing of the Census and resulting updated data.<sup>26</sup> Given the changes in worldwide economic activity since 1978, Commission is now concerned that the § 802.21 five-year period may be too long. At the time of the initial filing, the transaction may not present competition concerns, but such concerns could develop as a result of changes in the lines of business of the Acquiring Person and Acquired Person during the five-year period, but those changes would not require a new filing. As a result, the Commission seeks to understand the impact of shortening the § 802.21 five-year period through responses to the following questions:

1. Have there been changes in economic activity significant enough to raise concerns that the Commission may miss important competitive effects if it does not shorten the five-year term?

2. If there are reasons to believe that the § 802.21 five-year period is too long, what period would address concerns that additional acquisitions of the Acquired Entity present competitive

<sup>24</sup> Am. Bar Ass'n., *Premerger Notification Practice Manual*, Interpretation 96 (5th ed.).

<sup>25</sup> 43 FR 33450, 33493 (July 31, 1978).

<sup>26</sup> *Id.*

concerns because the lines of business of the Acquiring Person and/or Acquired Person have changed? Why would another period be more appropriate?

3. Is there is a class of Acquiring Persons for whom the decrease in the exemption period would cause significant burden? If not, why not? If so, how?

#### *B. Prior Acquisitions*

When the Acquiring Person and the Acquired Person report in the same or “overlapping” NAICS revenue code in Item 5 of the HSR Form, the Acquiring Person must report certain prior acquisitions in Item 8: (1) The acquisition of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity (subject to \$10 million limitation) and (2) any acquisition of assets valued at or above the statutory size-of-transaction test at the time of their acquisition. Item 8 limits the Acquiring Person’s disclosure to those acquisitions within the overlapping NAICS code over the last five years.

The Commission is concerned that Item 8 does not capture all competitively significant acquisitions. There are several reasons why this might be the case. For instance, the Acquiring Person does not have to disclose prior acquisitions when it and the Acquired Person report revenue in different NAICS codes. Nevertheless, overlapping NAICS codes are imperfect predictors of whether the acquisition presents competitive concerns that need review. For instance, an Acquiring Person is not subject to the disclosure requirement if a prior acquisition involved a potential competitor with no revenue in an overlapping NAICS code at the time of the acquisition. Similarly, an Acquiring Person need not disclose a prior acquisition that involved a vertical relationship when companies at different levels of the distribution chain report in different NAICS codes. As a result, the Commission is considering eliminating the overlapping NAICS code limitation in Item 8 so that the Acquiring Person would have to list all its acquisitions of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity (subject to the \$10 million limitation) and any acquisition of assets valued at or above the statutory size-of-transaction test at the time of their acquisition in the five years prior to filing. The Commission seeks comment on this potential change through responses to the following questions:

1. What would be the benefit or burden associated with this possible change? Are there any classes of transactions for which the benefit or burden would be greater? If there are classes of transactions for which the benefit is greater, why is the benefit greater? If there are classes of transactions for which the burden is greater, why is the burden greater?

2. Is there any way to distinguish prior acquisitions that might have competitive significance from those that do not, such that the Commission would not need to require a list of all prior acquisitions?

In addition to the topics outlined above, commenters are welcome to provide input on any other HSR Rule. As part of that input, identify the changes in investor behavior or competitive dynamics that would justify a change in the Commission’s current approach.

By direction of the Commission.

**April Tabor,**  
*Acting Secretary.*

**Statement of Commissioner Rohit Chopra**  
September 21, 2020.

#### **Summary**

- Premerger notification is a critical data source, but the Commission faces enormous information gaps when seeking to detect and halt anticompetitive transactions.

- While the proposed rule closes a loophole when it comes to investment manager holdings, the proposed approach to exempt a wide swath of minority stakes is concerning and adds to existing information gaps.
- The Commission needs to update the treatment of certain debt transactions when determining deal size for the purpose of premerger notification. The current approach allows dealmakers to structure anticompetitive transactions in ways that can go unreported.

In September 1976, Congress gave the Federal Trade Commission an important tool enabling it to block harmful mergers. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) requires prior notification to the antitrust agencies in advance of closing certain mergers and acquisitions.<sup>1</sup>

Prior to the HSR Act’s enactment, companies could quickly “scramble the eggs” of assets and operations, or even shut down functions. This made it extremely difficult for the antitrust agencies to remedy competitive harms through divestitures of assets. Years of protracted litigation to stop further damage and distortions were often the result.<sup>2</sup>

The HSR Act fundamentally changed the process of merger review by giving the

antitrust agencies time to halt anticompetitive transactions before these deals closed. Today, the FTC focuses a substantial portion of its competition mission on investigating and challenging mergers reported under the HSR Act. Importantly, only a small set of transactions—the ones with the highest valuations—are subject to premerger notification. The HSR Act specifies the valuation threshold, currently set at \$94 million, which is typically adjusted upward each year. Since there are many ways to determine a deal’s valuation, Congress gave the FTC broad authority to implement rules so that buyers know if they need to report their transactions and what they are required to submit with their filing. The Commission can also exempt classes of transactions and tailor filing requirements.

While premerger notification filings provide the Commission with certain nonpublic information,<sup>3</sup> gathering and analyzing market intelligence on transaction activity and competitive dynamics is a major challenge. We need to continuously assess how we can enhance our market monitoring techniques and evolve our analytical approaches.

Today, the Commission is soliciting comment on two rulemakings regarding our policies to implement the HSR Act’s premerger notification protocols. The first publication, a Notice of Proposed Rulemaking, proposes specific rules and exemptions. While some of the proposals are helpful improvements, I respectfully disagree with our approach to exempting a broad swath of transactions from reporting. The second publication, an Advance Notice of Proposed Rulemaking, requests comment on a broad range of topics to set the stage for modernizing the premerger notification program to align with market realities. I support soliciting input to rethink our approach. I discuss each of these rulemakings below.

#### **Notice of Proposed Rulemaking**

The Notice of Proposed Rulemaking outlines specific amendments that the Commission is proposing to the HSR rules. The aggregation and exemption provisions are particularly noteworthy. The aggregation provisions are worthwhile, since they close a loophole and align with market realities. However, I am concerned about the exemption provisions, since we will completely lose visibility into a large set of transactions involving non-controlling stakes.

#### *Aggregation Provisions*

The financial services industry is well known for using an alphabet soup of small entities, like shell companies, partnerships, and other investment vehicles, to structure deals. Even though they may be under common management by the same person or group, like a private equity fund or a hedge fund, these smaller legal entities are all treated separately under the existing rules.

The proposed aggregation provisions will help to prevent acquirers from splitting up

<sup>1</sup> Clayton Act section 7A, 15 U.S.C. 18a.

<sup>2</sup> For example, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), it took seventeen years of litigation before a divestiture finally took place.

<sup>3</sup> I agree with Commissioner Slaughter that current filing requirements, including for minority stakes, can have the beneficial effect of deterring certain anticompetitive transactions.

transactions into small slices across multiple investment vehicles under their control to avoid reporting. The proposal would require investors and other buyers to add together their stakes across commonly managed funds to determine whether they need to report a transaction.

#### Exemption Provisions

By creating a reporting threshold based on the value of a transaction, the law already exempts most transactions from agency review. Because of this, it is difficult to systematically track these transactions, and even harder to detect and deter those that are anticompetitive.

Now, the FTC is proposing to widen that information gap by creating a new exemption for minority stakes of 10% or less, subject to certain conditions. Importantly, the proposal is not exempting specific aspects of the reporting requirements—it is a total exemption, so the agency will receive no information whatsoever from the buyer or the seller that the transaction even occurred. This adds to the burdens and information asymmetries that the agency already faces when it comes to detecting potentially harmful transactions.<sup>4</sup>

Companies and investors purchase minority, non-controlling stakes in a firm for a number of reasons. Sometimes, buyers might start with a minority stake, with the goal—or even with a contractual option—of an outright takeover as they learn more about the company's operations. Even though they might have a small stake, they can exert outsized control. In other cases, buyers might look for minority stakes in multiple, competing firms within a sector or industry, and some or all of these acquisitions may fall below the reporting thresholds. Of course, if they are able to obtain seats on boards of directors of competing companies, this can be illegal.

Investors and buyers can only use the proposed exemption if they do not currently own stakes in firms that compete or do business with the company they plan to acquire. Since many investors might not know about the specific business dealings across companies, this may be difficult to enforce and puts more burden on the agency.

Even if one believes that transactions involving a minority stake are less likely to be illegal, there are many potential alternatives to outright elimination of reporting. Unfortunately, the rulemaking does not outline alternative approaches (such as tailored, simplified filing requirements or shortened waiting periods) for minority stakes.

#### Advance Notice of Proposed Rulemaking

As markets evolve, it is important that the HSR Act and its implementing rules reflect

those developments. The Advance Notice of Proposed Rulemaking seeks input on a wide array of market-based issues that may affect the Commission's merger oversight. One topic of particular interest is whether to include debt as part of the valuation of a transaction. Since the HSR Act's passage, corporate debt markets have grown in importance for companies competing in developed economies. Many major deals involve vast sums of borrowed money.

However, the Commission has not formally codified a view on the treatment of certain debt transactions. Instead, existing staff guidance excludes many debt transactions from the deal's overall value. This is worrisome, since it means that many potentially anticompetitive transactions can go unreported, since they may fall below the size threshold. In addition, this view has been provided informally, communicated through unofficial interpretations outside of formal rules or guidance. It will be important to take steps to collect input and codify the Commission's policies on valuation, particularly with respect to the treatment of debt, since formal guidance or rules will offer clarity and will be easier to enforce.

The Advance Notice of Proposed Rulemaking also seeks information that will lay groundwork for broader reforms to our premerger notification program. I look forward to the data and written submissions to this document.

#### Conclusion

Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.<sup>5</sup> The FTC ends up missing a large number of anticompetitive mergers every year. In addition, since amendments to the HSR Act in 2000 raised the size thresholds on an annual basis, the number of HSR-reportable transactions has *decreased*.

I want to commend agency staff for their work in identifying potential blind spots in the premerger reporting regime. I also want to thank state legislatures and state attorneys general for enacting and implementing their own premerger notification laws to fill in some of these gaps. For example, a new law in State of Washington has taken effect, which requires advance notice of any transactions in the health care sector, where many problematic mergers fall below the radar.<sup>6</sup>

<sup>5</sup> Small transactions can be just as harmful to competition as large transactions notified under the HSR Act. For example, "catch and kill" acquisitions of an upstart competitor in fast-moving markets can be particularly destructive. In addition, "roll-ups," an acquisition strategy involving a series of acquisitions of small players to combine into a larger one, can have very significant negative effects on competition. See Statement of Fed. Trade Comm'r Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577783/p110014hsrannualreportchoprastatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf).

<sup>6</sup> See Healthcare Transaction Notification Requirement, WASH. STATE OFF. OF THE ATT'Y

As we conduct this examination of the HSR Act, we should identify areas where laws may need to be changed or updated, especially when we cannot fill those gaps through amendments to our rules. For example, we may need to pursue reforms to ensure that "roll ups" are reported, where a buyer might acquire a large number of small companies that may not be individually reportable. We may also need to look carefully at the length of the waiting period, to determine if it is long enough to conduct a thorough investigation. I look forward to reviewing the input to these two rulemakings, so that our approach reflects market realities.

[FR Doc. 2020-21754 Filed 11-30-20; 8:45 am]

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## FEDERAL TRADE COMMISSION

### 16 CFR Parts 801, 802 and 803

RIN 3084-AB46

#### Premerger Notification; Reporting and Waiting Period Requirements

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Trade Commission ("FTC" or "Commission") is proposing amendments to the premerger notification rules ("the Rules") that implement the Hart-Scott-Rodino Antitrust Improvements Act ("the Act" or "HSR") to change the definition of "person" and create a new exemption. The Commission also proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

**DATES:** Comments must be received on or before February 1, 2021.

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "16 CFR parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014" on your comment. File your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the

GEN. (last visited Sept. 16, 2020), <https://www.atg.wa.gov/healthcare-transactions-notification-requirement>; see also S.H.B. 1607, 66th Leg., Reg. Sess. (Wash. 2019).

<sup>4</sup> The FTC may not be able to rely on other sources of robust data required by other agencies. For example, the Securities and Exchange Commission has proposed eliminating reporting for thousands of registered investment funds that previously detailed their holdings to the public. See Statement of SEC Comm'r Allison Herren Lee Regarding Proposal to Substantially Reduce 13F Reporting (July 10, 2020), <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:**

Robert Jones (202–326–3100), Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024.

**SUPPLEMENTARY INFORMATION:**

**Invitation To Comment**

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 1, 2021. Write “16 CFR parts 801–803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID–19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “16 CFR parts 801–803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state

identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential,”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](https://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this NPRM and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before February 1, 2021. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

**Overview**

The Act and Rules require the parties to certain mergers and acquisitions to file notifications (“HSR Filing”) with the Federal Trade Commission and with the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“the Assistant Attorney General”) (collectively, “the

Agencies”), and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek an injunction in Federal court in order to enjoin anticompetitive mergers prior to consummation.

In this notice of proposed rulemaking (“NPRM”), the Commission proposes amendments to the § 801.1(a)(1) definition of “person” to require certain acquiring persons to disclose additional information about their associates in Items 4 through 8 of the HSR Form and to aggregate acquisitions in the same issuer across their associates when making an HSR filing, as well as a ministerial change to § 801.1(d)(2). The Commission also proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer’s voting securities when the acquiring person does not already have a competitively significant relationship with the issuer. Finally, the Commission proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

Section 7A(d)(1) of the Clayton Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Clayton Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act, exempt classes of transactions that are not likely to violate the antitrust laws, and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

The Commission notes that comments it receives in response to this NPRM may also inform the Advanced Notice of Proposed Rulemaking (ANPRM) published in the **Federal Register** at the same time as this NPRM.

**Part 801—Coverage Rules**

§ 801.1 Definitions.

§ 801.2 Acquiring and acquired persons.

§ 801.12 Calculating percentage of voting securities.

#### Part 802—Exemption Rules

§ 802.15 De minimis acquisitions of voting securities.

#### Part 803—Transmittal Rules

Appendix A to Part 803—Notification and Report Form for Certain Mergers and Acquisitions

Appendix B to Part 803—Instructions to the Notification and Report Form for Certain Mergers and Acquisitions

#### Background

The HSR premerger notification program enables the Agencies to determine which acquisitions are likely to be anticompetitive and to challenge them before they are consummated when remedial action is most effective. Under the HSR program, the Agencies typically evaluate thousands of transactions every year. Given the large number of HSR filings submitted each year, the Agencies must use their resources effectively to focus on transactions that may harm competition. The Agencies have a strong interest in receiving HSR filings that contain enough information to conduct a preliminary assessment of whether the proposed transaction presents competition concerns, while at the same time not receiving filings related to acquisitions that are very unlikely to raise competition concerns. In the Agencies' experience, two particular categories of filings make it difficult for the Agencies to focus their resources effectively:

- *Filings for acquisitions by certain investment entities.* First, due to changes in investor structure and behavior since the HSR Act and Rules went into effect, filings from certain investment entities do not capture the complete competitive impact of a transaction. When certain investment entities file as acquiring persons, the Rules and Form do not currently require the disclosure of substantive information concerning both the complete structure of the acquiring person and the complete economic stake being acquired in an issuer.

- *Filings for acquisitions of 10% or less of an issuer.* At the same time, the Agencies regularly receive filings involving proposed acquisitions, not solely for the purpose of investment, that would result in the acquiring person holding 10% or less of an issuer. In the Agencies' experience, these filings almost never present competition concerns.<sup>1</sup>

To help the Agencies use their resources more effectively, the Commission proposes to address both issues in this proposed rulemaking. To obtain more complete filings from investment entities filing as acquiring persons, the Commission proposes amending the definition of person in § 801.1(a)(1) to include "associates," a term that is already defined in the Rules. This proposed change would require certain acquiring persons to disclose additional information about their associates in Items 4 through 8 of the HSR Form and to aggregate acquisitions in the same issuer across their associates when making an HSR filing. In addition, the Commission proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer's voting securities when the acquiring person does not already have a competitively significant relationship with the issuer. Finally, the Commission proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

#### I. Proposed Changes to § 801.1 Definitions

##### A. Proposed Change to the § 801.1(a)(1) Definition of "Person"

Since the promulgation of the Rules in 1978, the investment landscape has undergone vast changes, including the proliferation of investment entities such as investment funds and master limited partnerships ("MLPs"). Both investment funds and MLPs facilitate investment through structures utilizing limited partnerships and limited liability companies. The Rules define limited partnerships and limited liability companies as "non-corporate entities," and non-corporate entities are their own Ultimate Parent Entity ("UPE") under the Rules when no one holds the right to 50% or more of the profits or assets upon dissolution. Thus, although each non-corporate entity exists within an overall structure of a "family" of funds or MLP, each is typically its own UPE under the HSR Rules. For instance, Parent Fund creates Fund Vehicle 1,

stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less. Occasionally, the Agencies will require merging parties to divest or make passive small investments in competitors that also carry rights to influence business decisions at the firm. See *U.S. v. AT&T Inc. and Dobson Communications Corp.*, 1:07-cv-01952 (D.D.C. 2007) (parties divested small stakes that carried significant rights to control core business decisions, obtain critical confidential competitive information, and share in profits at a rate significantly greater than the equity ownership share).

Fund Vehicle 2, and Fund Vehicle 3, each a non-corporate entity. No one controls these non-corporate entities, so each fund vehicle is its own UPE even though they exist within the same family of funds. The same is true when no one controls non-corporate entities within a MLP structure; although they exist within the same MLP, each non-corporate entity is its own UPE.

Treating these non-corporate entities as separate entities under HSR is often at odds with the realities of how fund families and MLPs are managed. In the fund context, a fund vehicle typically has an entity that manages how that fund vehicle will invest,<sup>2</sup> and this investment manager very often manages the investments of other fund vehicles within the same family of funds. As a result, Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 might well have the same Investment Manager<sup>3</sup> and that Investment Manager can use Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 to make separate investments in different issuers or the same issuer. MLPs, for their part, often have similar structures involving non-corporate entities that are their own UPEs but under common management.<sup>4</sup>

When non-corporate entities are their own UPEs but under common management as described above, this creates two scenarios in which it is difficult for the Agencies to assess the competitive impact of a transaction based on the HSR filing. The first involves filings from non-corporate entity UPEs as acquiring persons that do not contain a complete enough picture of the investment fund or MLP. The Commission first addressed this category of filings in 2011 when it created the "associates" concept.<sup>5</sup> Before that time, filings from non-corporate entity UPEs within families of funds and MLPs contained limited substantive information because non-corporate entity UPEs were not required to disclose information on any other entity within the investment structure. For instance, if Fund Vehicle 1 made a filing for a 100% interest in an Issuer, and Fund Vehicle 2, under common investment management with Fund Vehicle 1, held 100% of a competitor of the Issuer, Fund Vehicle 2's holding was not disclosed in the filing because Fund Vehicle 1 was its own UPE. A filing such as the one from Fund Vehicle 1 was of limited use to the Agencies

<sup>2</sup> As defined in 16 CFR 801.1(d)(2).

<sup>3</sup> As defined in 16 CFR 801.1(d)(2).

<sup>4</sup> As defined in 16 CFR 801.1(d)(2); the management of MLPs does not have to involve investment management.

<sup>5</sup> 76 FR 42472 (July 19, 2011).

<sup>1</sup> From FY 2001 to FY 2017, the Agencies received a total of 26,856 HSR filings, including 1,804 for acquisitions of 10% or less of outstanding

because it did not reveal relevant holdings within the same family of funds. Filings received from newly-formed fund vehicles, which did not yet own anything, were of even less use because these filings were largely blank. Filings from non-corporate entities that were their own UPEs within MLP structures raised the same issues.

In light of these issues, the Commission determined that updates to the HSR Form would allow the Agencies to “receive the information they need to get a complete picture of potential antitrust ramifications of an acquisition.”<sup>6</sup> Accordingly in 2010,<sup>7</sup> the Commission introduced and proposed to define the term “associates” to capture information in the HSR Form from certain entities that are under common management with the acquiring person. The 2011 final rule<sup>8</sup> required certain acquiring persons to disclose in their HSR filings what their associates hold in entities that generate revenue in the same NAICS codes as the target. With this change, any fund vehicle filing as an acquiring person must look to its investment manager to determine what other fund vehicles that investment manager manages. For instance, Fund Vehicle 1’s investment manager also manages the investments of Fund Vehicle 2, making Fund Vehicle 1 and Fund Vehicle 2 associates. Fund Vehicle 1 makes an HSR filing for a 100% interest in Issuer Q. Fund Vehicle 2 controls Entity Y and has a minority position in Entity Z, both of which report in the same NAICS code as Issuer Q. Fund Vehicle 1 must therefore disclose in its HSR filing Fund Vehicle 2’s controlling interest in Y and minority interest in Z. Non-corporate entity UPEs within MLP structures must disclose the same information about their associates when filing as acquiring persons.

Although this additional information has been helpful in assessing the competitive impact of a transaction, it is too limited to provide the Agencies with a sufficient overview of investment funds and MLPs as acquiring persons. For instance, the information currently required from associates is limited to controlling or minority interests in entities that report in the same NAICS codes as the entity being acquired. In the Agencies’ experience, competitors sometimes use different NAICS codes to describe the same line of business, particularly in the case of companies engaged in technology-based businesses. In addition, associates currently are not

required to provide any substantive information, such as financials or revenues, about the entities they control, making it difficult for the Agencies to determine whether an entity within an associate might create a competitive concern in a given transaction.

It is also difficult for the Agencies to understand the potential competitive impact of a transaction when a filing does not represent the total economic stake being acquired in the same issuer. For instance, Investment Manager uses Fund Vehicle 1 to acquire 6% of Issuer D and Fund Vehicles 2 and 3 to each acquire 3% of Issuer D. Only Fund Vehicle 1’s acquisition of 6% of Issuer D’s voting securities is large enough to cross the \$50 million (as adjusted) size of transaction threshold. Fund Vehicle 1 makes an HSR filing, but because it is its own UPE, it need not disclose the interests of Fund Vehicles 2 and 3 in Issuer D. As a result, the filing does not reflect the 12% aggregate interest in Issuer D of the fund vehicles under common investment management. Another common example arises when Investment Manager uses Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 to each acquire 2% in Issuer D. If none of these acquisitions of 2% is large enough to cross the \$50 million (as adjusted) size of transaction threshold, the Agencies receive no HSR filing, even though the fund vehicles hold an aggregate 6% of Issuer D. Although more rare, both of these scenarios can also play out in the MLP context when non-corporate entity UPEs within the MLP structure make acquisitions in the same issuer.

To help the Agencies accurately assess the potential competitive impact of a pending transaction in these scenarios, the Commission proposes to amend the § 801.1(a)(1) definition of “person” to include associates, such that it would read as follows: “Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means (a) an ultimate parent entity and all entities which it controls directly or indirectly; and (b) all associates of the ultimate parent entity.”

This proposed change would require a non-corporate entity UPE filing as an acquiring person to disclose additional information from its associates in Items 4 through 8 of the Form<sup>9</sup> and to aggregate acquisitions in the same issuer across its associates.

Under the proposed rule, a non-corporate entity UPE filing as an

acquiring person would be part of a new, larger Acquiring Person. This Acquiring Person would include non-corporate entity UPE, its associates (which would also be UPEs) and the entity that manages non-corporate entity UPE and its associates (the “managing entity”).<sup>10</sup> The managing entity would make the filing on behalf of the Acquiring Person, identifying itself in proposed Item 1(a) of the Form, and identify the relevant UPE making the acquisition in proposed Item 1(c) of the Form.<sup>11</sup> If two UPEs within the same Acquiring Person are making reportable acquisitions in the same issuer, the managing entity can choose which one will be the relevant UPE for purposes of the form. The relevant UPE can also file on behalf of the managing entity, as noted in proposed Item 1(c) of the Form. For example:

#### Hypothetical #1

- Fund Vehicles 1, 2 and 3, each non-corporate entities and their own UPEs, exist within the same family of funds. Fund Vehicles 1, 2 and 3 have the same Investment Manager, and are thus associates. Fund Vehicle 1 will acquire 6% of Issuer D valued at \$100 million, Fund Vehicle 2 will acquire 6% of Issuer D valued at \$100 million and Fund Vehicle 3 will acquire 3% of Issuer D valued at \$50 million. The Acquiring Person includes Fund Vehicles 1, 2 and 3, which are all UPEs, and Investment Manager.

- Fund Vehicle 1 does not control any operating companies.

- Fund Vehicle 2 controls Portfolio Company A and Portfolio Company B. Portfolio Company B was acquired two years ago and reports in the same NAICS code as Issuer D.

- Fund Vehicle 3 controls Portfolio Company C, which does not report in the same NAICS code as Issuer D. Fund Vehicle 3 also holds a minority position in several entities, M, N, and O, which report in the same NAICS code as Issuer D.

- Investment Manager files on behalf of the Acquiring Person for the 15% aggregate interest in Issuer D valued at \$250 million by placing its name in Item 1(a) of the Form. Although Investment Manager could designate Fund Vehicle 1 or 2 as the UPE making the acquisition, Investment Manager indicates in Item 1(c) of the filing that Fund Vehicle 1 is making the acquisition. Fund Vehicle 1 can also indicate in Item 1(c) of the Form that it is filing on Investment Manager’s behalf. The filing must include the following:

- Item 4(a): This item requires the Central Index Key (CIK) number of all entities within the Acquiring Person, which now includes

<sup>10</sup> The same would be true for an Acquired Person under the proposed rule.

<sup>11</sup> In the case of an Acquired Person, the managing entity would make the filing on behalf of the Acquired Person, identifying itself in proposed Item 1(a) of the Form, and identifying the selling UPE in proposed Item 1(c) of the Form. The selling UPE could also indicate in Item 1(c) of the Form that it is filing on the managing entity’s behalf.

<sup>6</sup> *Id.*

<sup>7</sup> 75 FR 57111 (Sept. 17, 2010).

<sup>8</sup> 76 FR 42471 (July 19, 2011).

<sup>9</sup> For acquired persons, Items 5 through 7 of the Form will still be limited to the assets, voting securities, or non-corporate interests being sold.



Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 4(b): This item requires financials from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 4(c): This item requires responsive documents from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 4(d): This item requires responsive documents from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 5: This item requires revenues by NAICS and NAPCS codes for the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 6: Items 6(a) and 6(b) require information from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. Item 6(c) also requires information from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. However, the information required by Item 6(c) is still limited to minority holdings in entities that report in the same NAICS code(s) as the target, here M, N and O.

- Item 7: This item requires all responsive information from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. However, the information required by Item 7 is still limited to entities that report in the same NAICS code(s) as the target, here Portfolio Company B.

- Item 8: This item requires information on prior acquisitions within the last five years by the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. However, the information required by Item 8 is still limited to entities that report in the same NAICS code(s) as the target, here Portfolio Company B.

#### Hypothetical #2

- MLP creates LP1, LP2, and LP3, each a non-corporate entity and its own UPE, to separately hold the MLP's investments. LP1, LP2 and LP3 have the same Manager, and are thus associates. LP1 will acquire 100% of Issuer R valued at \$500 million. LP1 is the UPE but the Acquiring Person includes Manager, LP2 and LP3.

- LP1 controls two operating companies, OpCo 1 and OpCo 2, which report in the same NAICS code as Issuer R. OpCo 1 was acquired 10 years ago and OpCo 2 was acquired 3 years ago.

- LP2 controls OpCo 3, which reports in the same NAICS code as Issuer R and was acquired 1 year ago, and OpCo 4, which does not report in the same NAICS code as Issuer R.

- LP3 holds minority positions in OpCo 5 and OpCo 6, and each reports in the same NAICS code as Issuer R.

- Manager places its name in Item 1(a) of the Form to file on behalf of the Acquiring Person for the 100% interest in Issuer R, and indicates in Item 1(c) of the Form that LP1 is making the acquisition. LP1 can also indicate in Item 1(c) that it is filing on Manager's behalf. The filing must include the following:

- Item 4(a): This item requires the CIK number of all entities within the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 4(b): This item requires financials from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 4(c): This item requires responsive documents from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 4(d): This item requires responsive documents from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 5: This item requires revenues by NAICS and NAPCS codes for the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 6: Items 6(a) and 6(b) require information from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. Item 6(c) also requires information from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. However, the information required by Item 6(c) is still limited to minority holdings in entities that report in the same NAICS code(s) as the target, here OpCo 5 and OpCo 6.

- Item 7: This item requires all responsive information from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. However, the information required by Item 7 is still limited to entities that report in the same NAICS code(s) as the target, here OpCo 1, OpCo 2, and OpCo 3.

- Item 8: This item requires information on prior acquisitions within the last five years by the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. However, the information required by Item 8 is still limited to entities that report in the same NAICS code(s) as the target, here OpCo 2 and OpCo 3, but OpCo 1 would not be listed because it was acquired more than five years ago.

As these examples illustrate, the proposed change to § 801.1(a)(1) would require a non-corporate entity UPE

filing as an acquiring person to disclose more substantive information about its associates. The additional information required by the Form would be of tremendous value to the Agencies in assessing the potential competitive impact of a pending transaction. Specifically, the proposed changes to Items 4, 5 and 6(a) would give the Agencies a much better picture of what entities are under common management. The proposed changes to Item 6(b) would provide a clearer picture of the ways in which the entities within the acquiring person are connected, both within the investment structure and beyond. Proposed Item 8 would provide more complete information on entities within the acquiring person that have made acquisitions in the same industry as the target.<sup>12</sup> All of this additional information would give the Agencies a much more complete picture of who is making the filing in the case of investment funds and MLPs filing as acquiring persons.

The additional information concerning acquisitions made by a non-corporate entity UPE's associates in the same issuer would also be of great value to the Agencies. The proposed change to § 801.1(a)(1) would give the Agencies a much clearer understanding of the total economic stake being acquired in a single issuer by entities under common management. In some cases, looking across a non-corporate entity UPE's associates for acquisitions in the same issuer will result in a filing when one would not have been required previously. For instance, in a scenario where associates Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 will each acquire 2% of Issuer D for \$40 million, the Agencies currently do not receive a filing because none of the three \$40 million acquisitions is large enough to cross the \$50 million (as adjusted) size of transaction threshold. Under the proposed rule, the Agencies would now receive a filing for the aggregate 6% interest valued at \$120 million (assuming an exemption does not apply).<sup>13</sup>

The Commission acknowledges that the proposed change to § 801.1(a)(1) would result in more filings and an increased burden for certain acquiring

<sup>12</sup> There would be no change to the information Items 6(c) and 7 require, because those items already require information from associates. Each of these items would, however, be consolidated in the HSR Instructions and Form to reflect the new definition of "person," as explained below.

<sup>13</sup> In addition, certain acquiring persons will also be much more likely to meet the size of person test when including information about their associates as required by the proposed rule.

persons. Non-corporate entity UPEs within families of funds and MLPs would have to provide significant additional information on behalf of their associates under the proposed change. These entities are, however, already accustomed to looking into the holdings of those associates for filings where they are acquiring persons because some information about associates' holdings must be provided even under the current Rules. Given that these entities already conduct such inquiries, the Commission believes requiring additional information about entities that have already been identified should be manageable. The breadth of certain items will still be limited, and the burden should lessen after the first inquiry under the new rule. Nevertheless, the Commission acknowledges that there might be other ways to achieve the same result. The Commission invites comments on alternative ways the Agencies could obtain this necessary information that would result in a more limited burden for investment funds and MLPs filing as acquiring persons.

The proposed change to § 801.1(a)(1) would result in fewer filings and a reduced burden for certain other acquiring persons. The proposed rule would streamline the number of filings and fees from families of funds and MLPs. For instance, in the scenario where associates Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 will each acquire 7% of Issuer D for \$200 million, each currently must make a filing and pay a separate \$125,000 filing fee (assuming no exemptions apply). Under the proposed rule, the Agencies would receive one filing for 21% of Issuer D valued at \$600 million and one \$125,000 filing fee. In addition, the proposed rule would eliminate the need for a filing in the alternative. If the Investment Manager of associates Fund 1 and Fund 2 has not yet determined which of those funds should be the vehicle for a particular investment, the need to choose one for HSR filing purposes becomes moot under the proposed rule, eliminating the potential need to make two filings with two separate filing fees.

The Commission also proposes an additional reduction in burden for acquired persons. The HSR Form already limits what acquired persons must report in Items 5 through 7 to information on those assets, voting securities, and non-corporate interests being acquired in the transaction at issue. The limitation for acquired persons in these items is an acknowledgment that only what is being sold is relevant to the Agencies'

competition analysis. This is also the case for the financial information required in Items 4(a) and 4(b), and the Commission therefore proposes amending the HSR Instructions to create a similar limit for acquired persons with respect to these items. Under the proposed changes, an acquired person would provide relevant CIK numbers in response to Item 4(a) or financials in response to Item 4(b) only for (1) the assets, voting securities and non-corporate interests being acquired in the transaction at issue, and (2) the UPE of those assets, voting securities and non-corporate interests. This proposed amendment to the HSR Instructions would significantly limit what non-corporate entity UPEs within families of funds and MLPs would have to provide as acquired persons in response to Items 4(a) and 4(b) and would not adversely affect the Agencies' competitive analysis.

Finally, the Commission also acknowledges that certain non-corporate entity UPEs within families of funds and MLPs and their associates may be structured as index funds, exchange-traded funds (ETFs) or the like. Since these entities base their investments on an index, it is possible that it is not appropriate to apply the proposed change to § 801.1(a)(1) to these entities. The Commission invites comments on whether index funds, ETFs or the like should be differentiated under the proposed rule.

#### *B. Proposed Changes to § 801.1(d)*

Along with the proposed change to § 801.1(a)(1), the Commission also proposes conforming changes to the definition of associate in § 801.1(d)(2). Under the current definition, associate is only relevant to Items 6 and 7 of the HSR Form and to acquiring persons.<sup>14</sup> But the proposed change to the § 801.1(a)(1) definition of person would apply the associates concept more broadly in the HSR Form and to both acquiring and acquired persons. The Commission therefore proposes to eliminate the phrase "For purposes of Items 6 and 7" from § 801.1(d)(2), capitalize the subsequent "An" in § 801.1(d)(2) and include "or acquired" in § 801.1 (d)(2), (d)(2)(A) and (B) to reflect this proposed change.

### **II. Proposed § 802.15: De Minimis Acquisitions of Voting Securities**

To use their resources as effectively as possible, the Agencies have a strong interest not only in receiving HSR filings that contain sufficient information to assess whether proposed

transactions present real competition concerns, but also in eliminating filings for categories of acquisitions that are unlikely to create competitive concerns. In 1996, the Commission acknowledged this concern in issuing final rules exempting certain ordinary course transactions, as well as certain types of acquisitions of realty and carbon-based mineral reserves.<sup>15</sup> The Commission explained, "[t]hese rules are designed to reduce the compliance burden on the business community by eliminating the application of the notification and waiting requirements to a significant number of transactions that are unlikely to violate the antitrust laws. They will also allow the enforcement agencies to focus their resources more effectively on those transactions that present the potential for competitive harm."<sup>16</sup>

Under the same rationale, the Commission has long contemplated the exemption of acquisitions of 10% or less of the voting securities of an issuer. These kinds of acquisitions can take many forms. The most typical is when an entity acquires 10% or less of an issuer in order to provide that issuer with needed capital. Sometimes certain shareholders of the target will acquire less than 10% of the buyer's voting securities as consideration for the transaction (typically called shareholder backside acquisitions). Except for a few instances when a shareholder backside acquisition of 10% or less of an issuer's voting securities was linked to a larger transaction that presented competitive concerns,<sup>17</sup> the Commission has not sought to block any acquisition of 10% or less of an issuer's voting securities.

Recognizing that some acquisitions of 10% or less are less likely than others to raise competitive concerns, the Act already includes an exemption for acquisitions of 10% or less of the voting securities of an issuer made "solely for the purpose of investment."<sup>18</sup> This exemption is codified in § 802.9,<sup>19</sup> and § 801.1(i)(1) defines the term "solely for the purpose of investment" so that filing parties may determine whether § 802.9 is available. "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."<sup>20</sup>

<sup>15</sup> 61 FR 13666 (Mar. 28, 1996).

<sup>16</sup> 61 FR 13666 (Mar. 28, 1996).

<sup>17</sup> See, e.g., *In re Time Warner, Inc.*, et al., Docket No. C-3709, (Feb. 7, 1997).

<sup>18</sup> 15 U.S.C. 18a(c)(9).

<sup>19</sup> 16 CFR 802.9.

<sup>20</sup> 16 CFR 801.1(i)(1).

<sup>14</sup> 16 CFR 801.1(d)(2).



The Statement of Basis and Purpose for the original 1978 Rules (“1978 SBP”) lays out specific factors that further illuminate the § 801.1(i)(1) definition. “[M]erely voting the stock will not be considered evidence of an intent inconsistent with investment purpose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) Nominating a candidate for the board of directors of the Issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the Issuer; (5) being a competitor of the Issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the Issuer. The facts and circumstances of each case will be evaluated whenever any of these actions have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act’s requirements.”<sup>21</sup>

The Agencies have interpreted these factors narrowly: When an acquiring person takes any of the enumerated actions or is a competitor of the issuer, § 802.9 is generally not available.<sup>22</sup> On the other end of the spectrum, § 802.9 is clearly available if the acquiring person plans to do nothing but hold the stock. Given the changes in investor behavior since the HSR Act was passed,<sup>23</sup> however, a great deal of potential shareholder engagement involves more than merely holding (and potentially selling) stock, but does not encompass what the 1978 SBP discusses.<sup>24</sup>

Notably, some argue that communications between investors and management encourage corporate accountability to shareholders,<sup>25</sup> and that HSR filing requirements (and attendant obligations to provide notice to the issuer prior to purchase of the shares) might chill this beneficial interaction,<sup>26</sup> particularly since, depending on the degree of shareholder engagement, it can be quite difficult to determine whether filing parties can rely on the § 802.9 exemption. For instance, a discussion between shareholders and company executives may begin with the amount of compensation each executive receives, but then evolve into how each executive’s compensation will be determined by the company’s performance. This discussion on a seemingly innocuous topic may touch on basic business decisions, precluding

management as engagement priorities); *Vanguard Investment Stewardship 2019 Annual Report*, <https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019-investment-stewardship-annual-report.pdf> (discussing board composition (including diversity of gender, race and ethnicity) oversight of strategy and risk (including environmental risk), structure of executive compensation, and governance structures to support and ensure accountability of a company’s board and management to shareholders); and then *State Street Global Advisors Stewardship Report 2018–2019*, <https://www.ssga.com/library-content/products/esg/annual-asset-stewardship-report-2018-19.pdf> (describing engagement with boards and management teams, including, among other issues, “fearless girl campaign” to increase diversity of boards, “climate risk and reporting”, ethical issues in the pharmaceutical industry, including marketing of addictive substances, genetic engineering, and the use of personal data).

<sup>25</sup> See David Hirschmann, Comment, *FTC Hearings on Competition and Consumer Protection in the 21st Century*, (Dec. 6, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1422929/ftc\\_hearings\\_session\\_8\\_transcript\\_12-6-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_events/1422929/ftc_hearings_session_8_transcript_12-6-18_0.pdf), at 102 (“Engagement allows management to communicate with their shareholder base as they implement strategies to generate long-term growth” and is “important for healthy capital markets.”).

<sup>26</sup> See Council of Institutional Investors and the Managed Funds Association, Comment, *Re: Competition and Consumption Protection in the 21st Century Hearings, Project Number P181201—Investment Community Request for HSR Reform*, (Aug. 13, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/ftc-2018-0048-d-0010-147719.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0010-147719.pdf), at 1–2, and 7 (“[T]he investment community is concerned that the Commission’s increasingly narrow interpretation and application of the investment-only exemption under the HSR Act is imposing an undue regulatory burden and unnecessary costs on institutional investors, such as employee pension funds, charitable foundations and university endowments. That burden undermines the strong public policy in favor of management-shareholder communications, involves significant and unnecessary costs, and is not justified by the Commission’s mission to protect competition.” . . . “CII and MFA are concerned that the current narrow application of the investment-only exemption is interfering with an animating policy objective of the federal securities laws to ensure a free flow of information and disclosure from issuers of securities to the investing public.”).

use of the § 802.9 exemption. In the Agencies’ experience, even the simplest of topics can present subtleties that complicate whether § 802.9 might exempt an acquisition of 10% or less of an issuer’s voting securities.

Over the years, the Agencies have considered revising § 802.9 in order to provide clearer guidance on when the acquisition of 10% or less of an issuer’s voting securities is exempt from HSR filing requirements. In 1988, the Commission initiated a notice and comment proceeding on a proposed approach and two alternative approaches:

The principal proposal would exempt from the premerger notification obligations all acquisitions of 10% or less of an issuer’s voting securities on the grounds that such acquisitions are unlikely to violate the antitrust laws. The alternative proposals would alter existing notification procedures for acquisitions of 10% or less of an issuer’s voting securities. One would permit the purchase, but require that the securities be placed in escrow pending antitrust review; the other would eliminate the reporting requirement imposed on the target firm, thus freeing the acquiror of its obligation to give the target prior notice.<sup>27</sup>

The Commission’s principal proposal in 1988 was a new exemption, § 802.24, that would have subsumed § 802.9 “by eliminating the filing requirement for all acquisitions of 10 percent or less of an issuer’s voting securities, regardless of the intent of the acquired person.” Although the Commission had rejected calls to ignore investment intent in 1978 when the original Rules were promulgated, it proposed to exempt all acquisitions of 10% or less of an issuer’s voting securities based on ten years of experience with reviewing those filings that were not solely for the purpose of investment. “It is not possible to say that voting securities acquisitions of 10 percent or less, or 5 percent or less, cannot violate the antitrust laws. The proposed exemption is rather based on the evidently low likelihood that ‘the class of transactions’ will violate the antitrust laws.”<sup>28</sup>

But the Commission also considered alternative proposals that would more directly address concerns related to other aspects of the Act that could increase the cost of acquiring shares, specifically the requirement to wait for the expiration of the waiting period before acquiring shares, and the requirement to notify the target of the intended acquisition.<sup>29</sup> As a result, the

<sup>27</sup> 53 FR 36831 (Sept. 22, 1988).

<sup>28</sup> *Id.* at 36841.

<sup>29</sup> “Acquirors are reluctant to file premerger notifications because both the delay imposed by the

<sup>21</sup> 43 FR 33450, 33465 (July 31, 1978).

<sup>22</sup> Letter from Thomas J. Campbell, Dir., Bureau of Competition, FTC, to Michael Sohn, Esq., Arnold & Porter (Aug. 19, 1982) (on file with the 6th report to Congress).

<sup>23</sup> See Scott Hirst & Lucian Bebchuk, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 725–26 (2019). (In 1950, U.S. equities were predominantly held by households, with institutional investors accounting for only about six percent; now institutional investors hold 65 percent of U.S. equities); and then S&P Dow Jones Indices, Comment, *Re: FTC Hearing #8: Competition and Consumer Protection: Holdings of Non-Controlling Ownership Interests in Competing Companies*, (Jan. 15, 2019), [https://www.ftc.gov/system/files/documents/public\\_comments/2019/01/ftc-2018-0107-d-0015-163643.pdf](https://www.ftc.gov/system/files/documents/public_comments/2019/01/ftc-2018-0107-d-0015-163643.pdf), at 1 (“Fifty years ago, there were no index funds; all institutional (and retail) asset management was conducted on an active basis. Today, we estimate that between 20 to 25 percent of the U.S. stock market is held by index funds.”).

<sup>24</sup> See, e.g., *Blackrock, Investment Stewardship, Engagement Priorities for 2020*, <https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf> (identifying and describing board quality, environmental risk and opportunities, corporate strategy and capital allocation, compensation that promotes long-termism, and human capital

Commission proposed two alternative approaches. The first, proposed § 801.34, “would permit acquirors to purchase, but not take possession of, up to 10 percent of an issuer’s voting securities without filing a notification. The shares purchased would be placed in escrow and voted by the escrow agent in proportion to the votes cast by all other shares. The acquiror would be required to file and observe the waiting period prior to purchasing more than 10 percent of an issuer’s voting securities or prior to taking the shares out of escrow.”<sup>30</sup> The second proposal was an optional notification for acquisitions of 10% or less of the voting securities of an issuer. “This optional system would require the acquiror to submit specified public documents describing the entity to be acquired, but would not require that the issuer be given notice of the intended acquisition.”<sup>31</sup>

The 1988 proposed rulemaking received eighteen comments.<sup>32</sup> Some encouraged the Commission to move forward with the principal proposal that would exempt all acquisitions of 10% or less of an issuer’s voting securities regardless of investment intent. Several comments in favor of the principal proposal agreed with the Commission’s assertion in the proposed rulemaking that acquisitions of 10% or less of an issuer’s voting securities were unlikely to violate the antitrust laws.<sup>33</sup> In

waiting period and informing the target could increase the cost to them of acquiring the issuer’s voting securities.” 53 FR 36831, 36840 (Sept. 22, 1988).

<sup>30</sup> 53 FR 36831, 36,842 (Sept. 22, 1988).

<sup>31</sup> 53 FR at 36843.

<sup>32</sup> All comments are available at <https://www.ftc.gov/policy/public-comments/2020/08/initiative-122>.

<sup>33</sup> See Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf); James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf); Irving Scher, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment09.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment09.pdf); John A. Reid, Jr., Comment, *Re: Proposed Changes to Premerger Notification Rules*, 53 FR 36831, (Nov. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment11-2.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment11-2.pdf); Howard E. Steinberg, Comment, *Re: Proposed Changes to Premerger Notification Rules*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment12.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment12.pdf); and then William J. Kolasky, Jr., Comment, *Re: Comments*

addition, some of the comments noted that the proposed rule would “eliminate the incentive to avoid compliance with the H–S–R Act without prejudicing antitrust enforcement efforts”<sup>34</sup> and benefit the Commission through the “freeing up of Commission resources currently expended on compliance investigations regarding transactions that lack antitrust significance.”<sup>35</sup> Several comments also noted that the proposed rule would ease conflicts with the securities laws. A company wrote that “by allowing the acquisition of securities under the secrecy afforded by the securities laws, acquirors will be able to purchase stock at prices that are not artificially inflated by the publicity which can be generated by an HSR Act notification filing at the \$15 million reporting threshold.”<sup>36</sup>

*Submitted by Wilmer, Cutler & Pickering Regarding Proposed Amendments to the Hart-Scott-Rodino Improvement Act of 1976*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment13.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment13.pdf).

<sup>34</sup> See Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf), at 1. See also James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf).

<sup>35</sup> See Howard E. Steinberg, Comment, *Re: Proposed Changes to Premerger Notification Rules*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment12.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment12.pdf), at 2. See also Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf); and then James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf).

<sup>36</sup> See James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf), at 2. See also Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf); and then William J. Kolasky, Jr., Comment, *Re: Comments Submitted by Wilmer, Cutler & Pickering Regarding Proposed Amendments to the Hart-Scott-Rodino Improvement Act of 1976*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment13.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment13.pdf).

Other comments noted concerns with the proposed rule. One company wrote:

The proposed exemption for a person who acquires up to 10% of the securities of an issuer when such acquirer has the intent of influencing target’s management (which is virtually always the case for an acquisition of 10% of an issuer’s stock) is in diametric opposition to the fundamental purpose of the Act. Since power to influence the target’s management is the primary concern of Section 7, it is beyond our comprehension why the FTC would exempt review for acquisitions of up to 10% of an issuer’s stock when the acquisitions may be made for the purpose of influencing management.<sup>37</sup>

A trade association wrote: “The real thrust of the suggestion is not that the \$15 million threshold test serves no antitrust purpose, but rather that the FTC finds it difficult to force compliance by those who wish to make hostile tender offers. That, however, is not by itself an appropriate reason for the rules change. Violations cannot be ignored.”<sup>38</sup>

Members of Congress also weighed in on the proposed rulemaking. One argued that filing requirements should be enforced instead of changed<sup>39</sup> while another argued that the Agencies lacked the authority to create an exemption that would, in effect, render irrelevant the statutory minimum threshold.<sup>40</sup> Representative James J. Florio (then Chairman of the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce) wrote: “[t]he rulemaking notice points out that Congress was definitely interested in subjecting some types of acquisitions of 10 percent or less to premerger review.

<sup>37</sup> See Dennis P. Codon, Comment, *Re: Premerger Notification; Reporting and Waiting Period Requirements*, 53 FR 36831, (Nov. 7, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment06.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment06.pdf), at 1.

<sup>38</sup> See John W. Hetherington, Comment, *Re: 16 CFR parts 801, 802, and 803 Premerger Notification; Reporting and Waiting Period Requirements*, 53 FR 36831, (Dec. 19, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/12/p812937hsrrulemakingcomment17.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/12/p812937hsrrulemakingcomment17.pdf), at 2.

<sup>39</sup> See Jim Sasser, Comment, *Re: Premerger Notification*, 53 FR 36831, (Oct. 25, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment08.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment08.pdf), at 1, (“Indeed, I find the rationale for the proposed amendments flawed. The premerger notification rules should not be relaxed because, as you say, there is too much incentive to avoid them; rather, they should be strengthened.”).

<sup>40</sup> See Jack Brooks, Comment, 53 FR 36831, (Dec. 9, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/12/p812937hsrrulemakingcomment14.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/12/p812937hsrrulemakingcomment14.pdf), at 1, (“The proposal would, for all practical purposes, eliminate the \$15 million premerger notification threshold. I do not believe that Congress delegated authority to the Commission to repeal that statutory notification threshold.”).

In light of this Congressional intent, I am puzzled by the Commission's proposal to overrule Congressional intent by a blanket exemption." <sup>41</sup>

The Commission did not issue a final rule.

Since 1988, the parameters of the HSR premerger notification program have undergone considerable change. In 2000, Congress amended the Act to raise the minimum reportability threshold from \$15 million to \$50 million, and at the same time built in an automatic annual adjustment of all of the Act's thresholds based on the change in gross national product. Currently, a transaction must be valued at more than \$94 million to be potentially reportable, and the parties to that transaction must have sales or assets of at least \$188 million and \$18.8 million, respectively, unless the transaction is valued at more than \$376 million. The statutory thresholds have increased steadily since 2000,<sup>42</sup> which has reduced significantly the number of filings received by the Agencies.<sup>43</sup>

Since 1988, the Commission has also gained over 30 years of additional experience reviewing filings for acquisitions of 10% or less of an issuer's voting securities. Since the promulgation of the Rules in 1978, the Agencies have not challenged a stand-alone acquisition of 10% or less of an issuer, and have rarely engaged in a substantive initial review of a proposed acquisition of 10% or less of an issuer.<sup>44</sup> The Commission believes that proposed acquisitions of 10% or less of an issuer should be exempt when they are unlikely to violate the antitrust laws and that exempting this category of acquisitions will allow the Agencies to better focus their resources on transactions that create the potential for competition concerns. To achieve this goal, the Commission proposes a new approach to exempt acquisitions of 10% or less of an issuer's voting securities under certain conditions. Proposed § 802.15 reads as follows:

§ 802.15 De minimis acquisitions of voting securities

An acquisition of voting securities shall be exempt from the requirements of the act if as a result of the acquisition:

(a) The acquiring person does not hold in excess of 10% of the outstanding voting securities of the issuer; and

(b)(i) the acquiring person is not a competitor of the issuer (or any entity within the issuer);

(ii) the acquiring person does not hold voting securities in excess of 1% of the outstanding voting securities (or, in the case of a non-corporate entity, in excess of 1% of the non-corporate interests) of any entity that is a competitor of the issuer (or any entity within the issuer);

(iii) no individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of the issuer (or of an entity within the issuer);

(iv) no individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of a competitor of the issuer (or of an entity within the issuer); and

(v) there is no vendor-vendee relationship between the acquiring person and the issuer (or any entity within the issuer), where the value of sales between the acquiring person and the issuer in the most recently completed fiscal year is greater than \$10 million in the aggregate.

Proposed § 802.15 exempts acquisitions that would result in the acquiring person holding 10% or less of the issuer's outstanding voting securities, unless the acquiring person already has a competitively significant relationship with the issuer, such as where the acquiring person operates competing lines of business, has an existing vertical relationship with the issuer, or employs or is otherwise represented by an individual who is an officer or director of the issuer or a competitor. Because these types of relationships render even a small stake potentially competitively significant, the Commission proposes to continue to receive filings for any such acquisitions that are not exempt under § 802.9.

Over the last several years, there has been ongoing discussion of the impact of a single entity holding small percentages of voting securities in competitors within the same industry, sometimes referred to as common ownership.<sup>45</sup> The debate is not yet settled, but it has raised concerns about the competitive effect of common ownership because investors with small minority stakes may influence the behavior of an issuer. Thus, the

Commission proposes that the exemption in § 802.15 not apply if the acquiring person is a competitor of the issuer or if the acquiring person holds more than 1% in a competitor of the issuer on an aggregate basis. For instance, Fund Vehicle 1 will acquire 6% of Issuer D and Fund Vehicle 1 has two associates, Fund Vehicles 2 and 3. Fund Vehicle 1 is the UPE but the Acquiring Person includes Fund Vehicles 1, 2 and 3 under the proposed change to § 801.1(a)(1) discussed above. Fund Vehicles 1, 2 and 3 do not control any competitors of Issuer D and Fund Vehicle 1 does not hold any minority interest in a competitor of Issuer D, but Fund Vehicle 2 and Fund Vehicle 3 each holds a 1% minority interest in competitors of Issuer D. In this scenario, under the proposed rule, Fund Vehicle 1 would not be able to rely on proposed § 802.15 because its associates hold more than 1% in a competitor of Issuer D. This exception to the exemption would ensure the Agencies receive filings that provide insights into the influence of holdings in competitors. The Commission invites comment on this approach, including whether a different level of ownership in a competitor of the issuer would be more appropriate in determining that the proposed exemption should not apply.

The Rules do not currently define the term "competitor," and to implement this exception to the exemption, a definition must be added. The Commission proposes the following definition for the purpose of implementing § 802.15: "§ 801.1(r) *Competitor*. For purposes of these rules, the term *competitor* means any person that (1) reports revenues in the same six-digit NAICS Industry Group as the issuer, or (2) competes in any line of commerce with the issuer." This proposed definition of "competitor" would require two separate assessments to determine whether an acquiring person is a competitor of the issuer or holds interests in a competitor of the issuer. The first prong of the proposed definition would ask an acquiring person to look at the six-digit NAICS codes of entities it controls and compare them with the NAICS codes the issuer reports. NAICS codes (and their predecessor Standard Industrial Classification ("SIC") codes) have long been the basis for reporting revenues in the HSR Form, and they provide an objective and easy to administer measure of whether an acquiring person and an issuer compete. Moreover, because acquiring persons already compare their NAICS codes with those of the issuer in order to respond to items

<sup>41</sup> See James J. Florio, Chairman, Comment, *Re: Premerger Notification; Reporting and Waiting Period Requirements*, 53 FR 36831, (Oct. 12, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrulemakingcomment01.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrulemakingcomment01.pdf), at 2.

<sup>42</sup> The thresholds have increased every year except for 2010. 75 FR 3468 (Jan. 21, 2010).

<sup>43</sup> As a result of these changes, many acquisitions of small stakes that would have resulted in an HSR filing prior to 2001 no longer trigger an HSR filing.

<sup>44</sup> Note 1 *supra*.

<sup>45</sup> FTC Hearings on Competition and Consumer Protection in the 21st Century, Session 8, FTC.GOV. (Dec. 6, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century>. See also Submission of the United States to OECD Hearing on Common Ownership by institutional investors and its impact on competition, FTC.GOV. (Nov. 28, 2017), [https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/common\\_ownership\\_united\\_states.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/common_ownership_united_states.pdf).

in the Form, as discussed above, this approach would be familiar to acquiring persons.

Filing parties can still be “competitors” even if they report in different NAICS codes. Thus, the second prong of the proposed definition of “competitor” would rely on filing parties to conduct a good faith assessment to determine whether any part of the acquiring person competes with or holds interests in entities that compete with the issuer, in any line of commerce.<sup>46</sup> The Commission expects that parties would do so consistent with their ordinary course documentation and informational practices and be able to defend reliance on proposed § 802.15 if challenged.

The Commission acknowledges that this proposed two-prong definition of “competitor” is broad. The Agencies and the public will benefit from such a broad definition because the Agencies, in fulfilling their obligations to enforce the antitrust laws, have a strong interest in receiving HSR filings that reveal any indicia of competition between the filing parties so the Agencies can fully evaluate the competitive impact of the proposed acquisition. Nevertheless, the Commission invites comment on other ways to define “competitor” that would still provide the Agencies with thorough information on the competition that exists between filing parties.

Proposed § 802.15 also asks filing parties to ascertain the existence of officer or director relationships between the acquiring person and the issuer. That is, the exemption in proposed § 802.15 would be unavailable if someone from the acquiring person is an officer or director of the issuer or a competitor of the issuer. To be an officer or director of any issuer is to be intimately connected to that issuer. Officers make the issuer’s day-to-day business decisions, and directors determine the overall direction of the issuer. If someone within the acquiring person has that kind of influence over the issuer or a competitor of the issuer, the Agencies have a strong interest in receiving filings about that proposed transaction to better understand its competitive impact. Thus, this exception to the proposed exemption would ensure that acquisitions of potential competitive significance do not become exempt.

Finally, the proposed § 802.15 exemption would not be available if the acquiring person and the issuer are in a vertical relationship valued at \$10 million or greater. There can be important competitive implications in vertical relationships, and the Agencies have a strong interest in reviewing transactions that create or expand vertical relationships. This exception to the exemption would ensure the Agencies receive filings where the buyer and issuer have a vertical relationship beyond the ordinary course. The Commission intends to exclude the purchase of ordinary course services and goods (e.g., office supplies, financial services, etc.) and invites comment on whether \$10 million is an appropriate threshold to distinguish ordinary course vertical relationships from those with competitive significance.

Proposed § 802.15 would allow the Agencies “to focus their resources more effectively on those transactions that present the potential for competitive harm.”<sup>47</sup> Proposed § 802.15 would further the Agencies’ goal of eliminating filings for acquisitions of 10% or less of an issuer where there is no existing competitive relationship or significant vertical relationship between the acquirer and the issuer and where the acquisition therefore is unlikely to violate the antitrust laws. At the same time, proposed § 802.15 would balance the exemption of these kinds of acquisitions with the Agencies’ interest in making sure that acquisitions of potential competitive significance are not exempt. The Commission invites comment on whether there are other factors to consider in evaluating the proposed exceptions to the exemption, or if other categories should be the subject of exceptions to the exemption.

Under proposed § 802.15, acquiring persons would have to evaluate their connection to the issuer and the issuer’s competitors in several ways. Although this approach is not without burden for acquiring persons, the Commission believes that information concerning competitors, relationships with the issuer’s officers or directors, and vertical relationships will either already be in acquiring persons’ possession or will be relatively straightforward to gather. On the whole, proposed 802.15 should benefit acquiring persons by exempting acquisitions of small amounts of voting securities without an examination of intent as required by § 802.9. Section 802.9 would remain unchanged and would still be available to exempt acquisitions of 10% or less of an issuer

where there is no intention to be involved in the basic business decisions of that issuer. With the addition of proposed § 802.15, acquiring persons would have two potential ways to exempt the acquisition of 10% or less of an issuer’s voting securities.<sup>48</sup>

### III. Proposed Explanatory and Ministerial Changes to the Rules and the Form and Instructions

To help illustrate the proposed changes to § 801.1 discussed above, the FTC proposes adding some examples to the Rules. The proposed changes to § 801.1 would also require explanatory and ministerial updates to the Form and Instructions.

#### A. Revised Examples to §§ 801.1, 801.2

The Commission proposes revising the examples in §§ 801.1 and 801.2 to clarify the proposed definition of person.

#### Revised Examples to § 801.1

1. Edit example 4 to § 801.1(a)(1) to make “example” plural:

*Example 4:* See the examples to § 801.2(a).

2. Add example 5 and 6 to § 801.1(a)(1):

Example 5. Fund 1, Fund 2, and Fund 3, each a UPE, are all associates under the common investment management of Manager, as defined by § 801.1(d)(2). Fund 1’s portfolio company A is making a reportable acquisition. The acquiring person includes Manager, Fund 1, Fund 2, Fund 3, and A. Manager would file on behalf of the acquiring person by placing its name in Item 1(a) of the Form. Manager indicates in Item 1(c) of the filing that Fund 1 is making the acquisition. Fund 1 can also indicate in Item 1(c) of the Form that it is filing on Manager’s behalf.

Example 6. Fund A will be selling its portfolio company P. Fund A’s investments are managed by Investment Manager, and Fund A’s associates are Fund B, Fund C, and Fund D. The acquired person includes Investment Manager, Fund A, Fund B, Fund C, and Fund D. Investment Manager would file on behalf of Fund A, the selling UPE, by placing its name in Item 1(a) of the Form. Fund A could also indicate in Item 1(c) of the Form that it is filing on Investment Manager’s behalf.

3. Add example 4 to § 801.1(a)(3):

*Example 4:* See the examples to § 801.1(a)(1).

4. Edit text of § 801.1(d)(2) by removing “For purposes of Items 6 and 7 of the Form,” capitalizing the subsequent “An,” and including “or acquired” as appropriate, so that § 801.1(d)(2) reads as follows:

(d)(2) Associate. An associate of an acquiring or acquired person shall be an

<sup>46</sup> As part of a typical antitrust compliance program, a company may already identify other companies that have competing sales in order to avoid violating Section 8 of the Clayton Act. Subject to certain minimum thresholds, Section 8 prohibits a person from serving as a director or an officer of two or more corporations that are horizontal competitors.

<sup>47</sup> 61 FR 13666 (Mar. 28, 1996).

<sup>48</sup> Institutional investors can also continue to rely on § 802.64.

entity that is not an affiliate of such person but:

(A) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring or acquired entity (a “managing entity”); or

(B) Has its operations or investment decisions, directly or indirectly, managed by the acquiring or acquired person; or

(C) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(D) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

#### Revised Examples to § 801.2

1. In § 801.2(a), number the current example as “Example 1” and add example 2.

*Example 2:* See the examples to § 801.1(a)(1).

2. Add examples 3 and 4 to § 801.2(b)

*Example 3:* See the examples to § 801.1(a)(1).

*Example 4:* See the examples to § 801.12(a).

#### Revised Examples to § 801.12(a)

1. In § 801.12(a), number the current example as “example 1” and add example 2:

*Example 2.* Person “A” is composed of corporation A1 and subsidiary A2; person “B” is composed of Fund 1 and Fund 2, which are associates managed by Investment Manager. Both Fund 1 and Fund 2 hold shares of Issuer. A2 will acquire all of Issuer’s voting securities held by Fund 1 and Fund 2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the “acquired person” is Issuer. For all other purposes, the acquired person is “B.” (For all purposes, the “acquiring person” is “A.”)

#### *B. Ministerial Changes to the Instructions and the Form*

The Commission also proposes the following changes to the Instructions and Form to clarify the definition of person as well as to streamline the Form where appropriate in light of the proposed changes:

##### Definitions, p.I of Instructions:

The terms “person filing” or “filing person” mean an ultimate parent entity (“UPE”) and its associates. Every person will have at least one UPE, and a person may be the same as its UPE. Not every person will have associates, but when a person has associates, the person will not be the same as its UPE(s). (See § 801.1(a)(1) and (d)(2).)

##### Item 1(a), p.IV of Instructions:

Provide the name, headquarters address, and website (if one exists) of the person filing notification. A person includes associates, but not every person will have associates. In the case of a person that has associates, the

person filing is the entity that manages the associates (“managing entity”) as defined by § 801.1(d)(2). (See § 801.1(a)(1) and (d)(2).)

##### Item 1(c), p.IV of the Instructions:

Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, managing entity or other (specify). If the person is a managing entity, indicate the UPE making the acquisition. Indicate if a UPE is filing on behalf of the managing entity. (See § 801.1 and (d)(2).)

##### Item 1(c) in the Form:

This item will include a new box for managing entity and space for listing the name of the UPE making the acquisition.

##### Item 3(a), p.V of the Instructions:

Clarify that the item calls for information on the UPEs that are party to the transaction.

First paragraph: At the top of Item 3(a), list the name and mailing address of each acquiring and acquired UPE, and acquiring and acquired entity, that are party to the transaction whether or not required to file notification. It is not necessary to list every subsidiary wholly-owned by an acquired entity.

##### Item 4(a), p.VI of the Instructions:

Add a requirement for acquiring persons to organize by UPE and by entity within each UPE. Specify limits for acquired persons.

Acquiring persons: Provide the names of all entities within the person filing notification, including all UPEs, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (“CIK”) number for each entity. Responses must be organized by UPE and by entity within each UPE.

Acquired persons: Provide the names of all entities within the selling UPE, including the UPE, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

##### Item 4(b), p.VI of the Instructions:

Specify limits for acquired persons. Add a requirement to organize by UPE and by entity within each UPE.

Acquiring persons: provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification. The acquiring person should also provide the most recent reports of the acquiring entity(s) and any controlled entity whose dollar revenues contribute to an overlap reported in Item 7. Responses must be organized by UPE and by entity within each UPE. If some of the UPEs or entities do not prepare separate financial statements, explain how their financial information is consolidated in the financial statements that are being submitted.

Acquired persons: Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the selling UPE. The acquired person should also provide the most recent reports of the acquired entity(s).

##### Item 5, p.VII of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

Second paragraph: Responses must be organized by UPE and entity within each

UPE. List all NAICS and NAPCS codes in ascending order.

##### Item 5(a), p.VII of the Instructions:

Clarify requirement for persons.

Last paragraph: Check the Overlap box for every 6-digit manufacturing and non-manufacturing NAICS code and every 10-digit NAPCS code in which both persons generate dollar revenues.

##### Item 6(a), p.VIII of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

*Subsidiaries of filing person.* List the name, city, and state/county of all U.S. entities, and all foreign entities that have sales in or into the U.S., that are included within the person filing notification. Responses must be organized by UPE and by entity within each UPE. Entities with total assets of less than \$10 million may be omitted. Alternatively, the person filing notification may report all entities within it.

##### Item 6(b), p.VIII of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

*Minority shareholders.* For the acquired entity(s) and, for the acquiring person, the managing entity, all UPEs and the acquiring entity(s) or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within the UPE(s), list the name and headquarters mailing address of each shareholder that holds 5% or more but less than 50% of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person. Responses must be organized by UPE and entity within each UPE. (See § 801.1(c)).

##### Item 6(c), p.VIII-IX of the Instructions:

Item 6(c) is currently segmented into two different sections: Item 6(c)(i) deals with the person filing and Item 6(c)(ii) deals with that person’s associates. Since the proposed definition of person would include associates, these two items within 6(c) would be collapsed and the Item renumbered to Item 6(c) with no subparts. The information required by this item would still be limited to entities within the acquiring person that report in the same NAICS code as the target. New 6(c) would read as follows:

##### Item 6(c)

*Minority holdings of filing person.* If the person filing notification holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, list the unincorporated entity and the percentage of non-corporate interests held.

*The acquiring person should limit its response,* based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. The acquiring person may rely on its regularly prepared financials that list its investments, provided the financials are no more than three months old. Responses must be organized by UPE and by entity within each UPE.

The *acquired person* should limit its response, based on its knowledge or belief, to entities that derive dollar revenues in the same 6-digit NAICS industry code as the acquiring person.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Item 6(c), it is permissible for the acquiring person to list all entities in which it holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings in those entities that have total assets of less than \$10 million may be omitted.

Item 7, p.IX–X of the Instructions:

Item 7(a) currently requires information from both the acquiring person and its associates. Since the proposed definition of person would include associates, Item 7(a) would be revised to eliminate the separate reference to associates.

#### Item 7(b)

The information required by Item 7(b) would be incorporated into Items 5 and 6(a), so this item would be eliminated.

#### Items 7(c) and 7(d)

Current Item 7(c) deals with the person filing and Item 7(d) deals with that person's associates, so these two items would be collapsed and renumbered to new 7(b).

New Item 7 would read as follows:

If, to the knowledge or belief of the person filing notification, the acquiring person derived any amount of dollar revenues (even if omitted from Item 5) in the most recent year from operations:

(1) In industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived *any amount* of dollar revenues in the most recent year; or

(2) in which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person *not* contributed to the joint venture.

Responses must be organized by UPE and by entity within each UPE.

#### Item 7(a)

##### Industry Code Overlap Information

Provide the 6-digit NAICS industry code and description for the industry.

#### Item 7(b)

##### Geographic Market Information

Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Note that except in the case of those NAICS industries in the Sectors and Subsectors mentioned in Item 7(b)(iv)(b), the person

filing notification may respond with the word “national” if business is conducted in all 50 states.

#### Item 7(b)(i)

##### NAICS Sectors 31–33

For each 6-digit NAICS industry code within NAICS Sectors 31–33 (manufacturing industries) listed in Item 7(a), list the relevant geographic information in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold). Except for industries covered by Item 7(b)(iv)(b), the relevant geographic information is all states or, if desired, portions thereof.

#### Item 7(b)(ii)

##### NAICS Sector 42

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a), list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

#### Item 7(b)(iii)

##### NAICS Industry Group 5241

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a), list the state(s) in which the person filing notification is licensed to write insurance.

#### Item 7(b)(iv)(a)

##### Other NAICS Sectors

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 11 agriculture, forestry, fishing and hunting
- 21 mining
- 22 utilities
- 23 construction
- 48–49 transportation and warehousing
- 511 publishing industries
- 515 broadcasting
- 517 telecommunications
- 71 arts, entertainment and recreation

#### Item 7(b)(iv)(b)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, provide the address, *arranged by state, county and city or town*, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

- 2123 nonmetallic mineral mining and quarrying
- 32512 industrial gases
- 32732 concrete
- 32733 concrete products
- 44–45 retail trade, *except* 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores)
- 512 motion picture and sound recording industries

- 521 monetary authorities—central bank
- 522 credit intermediation and related activities
- 532 rental and leasing services
- 62 health care and social assistance
- 72 accommodations and food services, *except* 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses)
- 811 repair and maintenance, *except* 8114 (personal and household goods repair and maintenance)
- 812 personal and laundry services

#### Item 7(b)(iv)(c)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 442 furniture and home furnishings stores
- 443 electronics and appliance stores
- 516 internet publishing & broadcasting
- 518 internet service providers
- 519 other information services
- 523 securities, commodity contracts and other financial investments and related activities
- 5242 insurance agencies and brokerages, and other insurance related activities
- 525 funds, trusts and other financial vehicles
- 53 real estate and rental and leasing
- 54 professional, scientific and technical services
- 55 management of companies and enterprises
- 56 administrative and support and waste management and remediation services
- 61 educational services
- 7212 recreational vehicle parks and recreational camps
- 7213 rooming and boarding houses
- 813 religious, grantmaking, civic, professional, and similar organizations
- 8114 personal and household goods repair and maintenance

Item 8, p.XI of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

For each such acquisition, supply:

- (1) The 6-digit NAICS industry code (by number and description) identified above in which the acquired entity derived dollar revenues;
- (2) the name of the entity from which the assets, voting securities or non-corporate interests were acquired;
- (3) the headquarters address of that entity prior to the acquisition;
- (4) whether assets, voting securities or non-corporate interests were acquired; and
- (5) the consummation date of the acquisition.

Responses must be organized by UPE and by entity within each UPE.

#### IV. Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or



Commissioner's advisor, will be placed on the public record. See 16 CFR 1.26(b)(5).

## V. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small entities, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR filing, the premerger notification rules rarely, if ever, affect small entities.<sup>49</sup> The 2000 amendments to the Act exempted all transactions valued at \$50 million or less, with subsequent automatic adjustments to take account of changes in Gross National Product resulting in a current threshold of \$94 million. Further, none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities. Accordingly, the Commission certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

## VI. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501–3521, requires agencies to submit “collections of information” to the Office of Management and Budget (“OMB”) and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The existing information collection requirements in the HSR Rules and Form have been reviewed and approved by OMB under OMB Control No. 3084–0005. The current clearance expires on January 31, 2023. Because the rule amendments proposed in this NPRM would change existing reporting requirements, the Commission is submitting a Supporting Statement for Information Collection Provisions (“Supporting Statement”) to OMB.

### *Amending § 801.1(a)(1)—Acquiring Persons*

The Commission proposes to amend the § 801.1(a)(1) definition of “person” to require certain acquiring persons to disclose additional information about

their associates when making an HSR filing. Thus, Items 4 through 8 (excluding Items 6(c) and 7)<sup>50</sup> on the Notification and Report Form (HSR Form) would be revised to seek information about associates of certain acquiring persons, including the aggregation of acquisitions in the same issuer across its associates. The Commission acknowledges that this proposed change would result in an increased burden for certain acquiring persons. Non-corporate entity UPEs within families of funds and MLPs would be required to provide significant additional information on behalf of their associates under the proposed change. These entities are, however, already accustomed to looking into the holdings of those associates for filings where they are acquiring persons as a result of the treatment of associates under the current Rules. Given that these entities already conduct such inquiries, the Commission believes requiring additional information about entities that have already been identified should result in limited additional burden for filers. Based on filing data from the past five fiscal years, the Commission estimates that 17.28% of entities would be required to provide additional information on behalf of associates. From this, we anticipate 846 filings would be affected per fiscal year ( $17.28\% \times 4894$  filings per year, as estimated in the FTC's most recent PRA clearance for the HSR Rules). The Commission also estimates that each affected filer will need about 10–15 additional hours per filing to comply. Thus, the aggregation is expected to lead to 10,575 additional annual hours of burden ( $846$  filings  $\times$   $12.5$  hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

The proposed change to § 801.1(a)(1) would also result in a reduced burden for certain acquiring persons by eliminating the potential need for families of funds and MLPs to make multiple filings with multiple filing fees. Based on filing data from the past five fiscal years, the Commission estimates that 39 filings would be affected per fiscal year. Since the FTC's current clearance with OMB estimates an average reporting burden per responding filer of 37 hours per filing, the proposed change to § 801.1(a)(1) would be a reduction of 1,443 hours of annual burden ( $39$  filings  $\times$   $37$  hours per filing). The Commission seeks

comments to help inform such burden estimates, to the extent applicable.

### *Acquired Persons*

Additionally, the Commission's proposal to revise the HSR Instructions to limit the financial information required in Items 4(a) and 4(b) should reduce burden for certain acquired persons. The HSR Form already limits what acquired persons must report in Items 5 through 7 to information on those assets, voting securities and non-corporate interests being acquired in the transaction at issue. The Commission's proposal to amend the HSR Instructions would create a similar limit for acquired persons with respect to Items 4(a) and 4(b) and should result in a reduction in the burden for families of funds and MLPs filing as acquired persons who will now face a more limited reporting burden after the amendments. Based on filing data from the past five fiscal years, the Commission estimates that 357 filings would be affected per fiscal year. The Commission also estimates that the burden on each affected filer will be reduced by 5 hours per filing. Thus, the proposed limit for acquired party reporting is expected to lead to a reduction in burden of 1,785 annual hours ( $357$  filings  $\times$   $5$  hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

### *Amending § 802.15—Acquisition of 10% or less*

Additionally the Commission proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer's voting securities in certain circumstances. Proposed § 802.15 exempts the acquisition of 10% or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer, such as operating competing lines of business or having an existing vertical relationship, or where the investor (or its agent) is an officer or director of the issuer or a competitor. This proposed exemption would allow the acquisition of small amounts of voting securities without an examination of intent as required by § 802.9. As a result, the Commission anticipates that this exemption will reduce somewhat the number of transactions subject to review under the Rule and the number of entities that must engage in reporting under the Rule. Over the period from FY 2001 to FY 2017, the Commission received an average of 106 filings per fiscal year for acquisitions of 10% or

<sup>49</sup> See 13 CFR part 121 (regulations defining small business size).

<sup>50</sup> There would be no changes to what Items 6(c) and 7 require, because those items already require information from associates.



less.<sup>51</sup> Some of these filings would fall within the exemption in proposed § 802.15, leading to a reduction in burden for entities that would no longer need to report under the Rule. However, the Commission does not currently possess information as to how many entities would qualify for the proposed § 802.15 exemption. The Commission therefore requests comment on the percentage of entities that would qualify for the proposed exemption.

#### *Explanatory and Ministerial Changes*

Finally, the Commission proposes explanatory and ministerial changes to the rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes. These changes will result in no change to the information collection burden under the Rule.

#### *Request for Comments*

As noted above, the Commission invites comments on anticipated burdens for the proposed amendments and comments that will enable it to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections 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 collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

Comments on the proposed reporting requirements subject to Paperwork Reduction Act review by OMB should additionally be submitted to [www.reginfo.gov/public/do/PRAMain](http://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. The [reginfo.gov](http://reginfo.gov) web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs

(OIRA) reviews Federal information collections.

#### **List of Subjects in 16 CFR Parts 801, 802, and 803**

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes to amend 16 CFR parts 801, 802, and 803 as set forth below:

#### **PART 801—COVERAGE RULES**

■ 1. The authority citation for part 801 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 2. Amend § 801.1 by:

■ a. Revising paragraph (a)(1) introductory text;

■ b. Adding paragraphs (a)(1)(i) and (ii);

■ c. Revising example 4 to paragraph (a)(1);

■ d. Adding examples 5 and 6 to paragraph (a)(1);

■ e. Adding example 4 to paragraph (a)(3);

■ f. Revising paragraph (d)(2); and

■ g. Adding paragraph (r).

The revisions and additions read as follows:

##### **§ 801.1 Definitions.**

\* \* \* \* \*

(a)(1) *Person*. Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means:

(i) An ultimate parent entity and all entities which it controls directly or indirectly; and

(ii) All associates of the ultimate parent entity.

*Examples:* \* \* \* 4. See the examples to § 801.2(a).5. Fund 1, Fund 2, and Fund 3, each a UPE, are all associates under the common investment management of Manager, as defined by § 801.1(d)(2). Fund 1's portfolio company A is making a reportable acquisition. The acquiring person includes Manager, Fund 1, Fund 2, Fund 3, and A. Manager would file on behalf of the acquiring person by placing its name in Item 1(a) of the Form. Manager indicates in Item 1(c) of the filing that Fund 1 is making the acquisition. Fund 1 can also indicate in Item 1(c) of the Form that it is filing on Manager's behalf.6. Fund A will be selling its portfolio company P. Fund A's investments are managed by Investment Manager, and Fund A's associates are Fund B, Fund C, and Fund D. The acquired person includes Investment Manager, Fund A, Fund B, Fund C, and Fund D. Investment Manager would file on behalf of Fund A, the selling UPE, by placing its name

in Item 1(a) of the Form. Fund A could also indicate in Item 1(c) of the Form that it is filing on Investment Manager's behalf.

\* \* \* \* \*

(3) \* \* \*

*Examples:* \* \* \* 4. See the examples to § 801.1(a)(1).

\* \* \* \* \*

(d) \* \* \*

(2) *Associate*. An associate of an acquiring or acquired person shall be an entity that is not an affiliate of such person but:

(i) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring or acquired entity (a "managing entity"); or

(ii) Has its operations or investment decisions, directly or indirectly, managed by the acquiring or acquired person; or

(iii) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(iv) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

\* \* \* \* \*

(r) *Competitor*. For purposes of these rules, the term *competitor* means any person that:

(1) Reports revenues in the same six-digit NAICS Industry Group as the issuer, or

(2) Competes in any line of commerce with the issuer.

■ 3. Amend § 801.2 by revising the example to paragraph (a) and adding examples 3 and 4 to paragraph (b) to read as follows:

##### **§ 801.2 Acquiring and acquired persons.**

(a) \* \* \*

*Examples:* 1. Assume that corporations A and B, which are each ultimate parent entities of their respective "persons," created a joint venture, corporation V, and that each holds half of V's shares. Therefore, A and B each control V (see § 801.1(b)), and V is included within two persons, "A" and "B." Under this section, if V is to acquire corporation X, both "A" and "B" are acquiring persons.

2. See the examples to § 801.1(a)(1).

(b) \* \* \*

*Examples:* \* \* \* 3. See the examples to § 801.1(a)(1).

4. See the examples to § 801.12(a).

\* \* \* \* \*

■ 4. Amend § 801.12 by revising the example to paragraph (a) to read as follows:

##### **§ 801.12 Calculating percentage of voting securities.**

(a) \* \* \*

<sup>51</sup> As set out in footnote 1, the Agencies received a total of 1,804 HSR filings from FY 2001 to FY 2017 for acquisitions of 10% or less of outstanding stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less.

*Examples:* 1. Person “A” is composed of corporation A1 and subsidiary A2; person “B” is composed of corporation B1 and subsidiary B2. Assume that A2 proposes to sell assets to B1 in exchange for common stock of B2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the “acquired person” is B2. For all other purposes, the acquired person is “B.” (For all purposes, the “acquiring persons” are “A” and “B.”) 2. Person “A” is composed of corporation A1 and subsidiary A2; person “B” is composed of Fund 1 and Fund 2, which are associates managed by Investment Manager. Both Fund 1 and Fund 2 hold shares of Issuer. A2 will acquire all of Issuer’s voting securities held by Fund 1 and Fund 2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the “acquired person” is Issuer. For all other purposes, the acquired person is “B.” (For all purposes, the “acquiring person” is “A.”)

\* \* \* \* \*

## PART 802—EXEMPTION RULES

■ 5. The authority citation for part 802 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 6. Add § 802.15 to read as follows:

### § 802.15 De minimis acquisitions of voting securities.

An acquisition of voting securities shall be exempt from the requirements of the act if as a result of the acquisition:

(a) The acquiring person does not hold in excess of 10% of the outstanding voting securities of the issuer; and

(b)(1) The acquiring person is not a competitor of the issuer (or any entity within the issuer);

(2) The acquiring person does not hold voting securities in excess of 1% of the outstanding voting securities (or, in the case of a non-corporate entity, in excess of 1% of the non-corporate interests) of any entity that is a

competitor of the issuer (or any entity within the issuer);

(3) No individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of the issuer (or of an entity within the issuer);

(4) No individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of a competitor of the issuer (or of an entity within the issuer); and

(5) There is no vendor-vendee relationship between the acquiring person and the issuer (or any entity within the issuer), where the value of sales between the acquiring person and the issuer in the most recently completed fiscal year is greater than \$10 million in the aggregate.

Example 1 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 has a .4% interest in a competitor of Issuer and Fund 2 has a .5% interest in the same competitor of Issuer. The acquisition of the 5% interest in Issuer would be exempt under § 802.15.

Example 2 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 has a .4% interest in a competitor of Issuer and Fund 2 has a .3% interest in a different competitor of Issuer. The acquisition of the 5% interest in Issuer would be exempt under § 802.15.

Example 3 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 controls an operating company that is a competitor of Issuer. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 4 to paragraph (b)(5). Investment Manager manages the investments of Fund 1, Fund 2, Fund 3, and Fund 4, which are associates. Investment Manager, Fund 1, Fund 2, Fund 3 and Fund 4 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 2, Fund 3 and Fund 4 each have a .4% interest in a competitor of Issuer. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 5 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. One of Fund 2’s officers (or the equivalent thereof) also serves as an officer of Issuer. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 6 to paragraph (b)(5). Investment Manager manages the investments of Fund 1, Fund 2, Fund 3, and Fund 4, which are associates. Investment Manager, Fund 1, Fund 2, Fund 3 and Fund 4 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. One of Fund 4’s officers (or the equivalent thereof) also serves as an officer of a competitor of Issuer’s subsidiary. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 7 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 controls an operating company that has a vendor-vendee relationships with Issuer valued in excess of \$10 million. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

## PART 803—TRANSMITTAL RULES

■ 7. The authority citation for part 803 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 8. Revise Appendix A to part 803 to read as follows:

**BILLING CODE** 6750-01-P

## 16 C.F.R. Part 803 - Appendix

( Filing is: ☐ New ☐ Amended )

## NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Electronic Form Version 1.0.2, 01/02/2017

Missing Mandatory Items for Submission:

TRANSACTION NUMBER ASSIGNED

## FEE INFORMATION (For Payer Only)

TAXPAYER IDENTIFICATION NUMBER \_\_\_\_\_

☐ OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

AMOUNT PAID \$ \_\_\_\_\_

NAME OF PAYER (if different from PERSON FILING) \_\_\_\_\_

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ATTACHED ☐

WIRE TRANSFER CONFIRMATION NO. \_\_\_\_\_

FROM (NAME OF INSTITUTION) \_\_\_\_\_

IS THIS A CORRECTIVE FILING? YES ☐ NO ☐CASH TENDER OFFER? ☐ YES ☐ NOBANKRUPTCY? YES ☐ NO ☐DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? ☐ YES ☐ NO

(Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov)

(voluntary) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? ☐ YES ☐ NO

IF YES, list jurisdictions: \_\_\_\_\_

## ITEM 1

NAME  
HEADQUARTERS ADDRESS  
ADDRESS LINE 2  
CITY, STATE, COUNTRY  
ZIP CODE  
WEB SITE

1(a) PERSON FILING

1(b) PERSON FILING NOTIFICATION IS ☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION

☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Managing Entity ☐ Other \_\_\_\_\_

1(d) DATA FURNISHED BY

☐ calendar year ☐ fiscal year (specify period): \_\_\_\_\_ (month/year) to \_\_\_\_\_ (month/year)

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

☐ Not Applicable ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).NAME  
ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

NAME  
ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE☐ Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f)

%

1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT

CONTACT PERSON 1  
FIRM NAME  
BUSINESS ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE  
TELEPHONE NUMBER  
FAX NUMBER  
E-MAIL ADDRESSCONTACT PERSON 2  
FIRM NAME  
BUSINESS ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE  
TELEPHONE NUMBER  
FAX NUMBER  
E-MAIL ADDRESS

1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii))

NAME  
FIRM NAME  
BUSINESS ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE  
TELEPHONE NUMBER  
FAX NUMBER  
E-MAIL ADDRESS

NAME OF PERSON FILING NOTIFICATION

DATE

**ITEM 2****2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL  
ACQUIRING PERSONS**

Add Row

| NAME | NON-REPORTABLE                  |
|------|---------------------------------|
|      | <input type="checkbox"/> Delete |

**LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL  
ACQUIRED PERSONS**

Add Row

| NAME | NON-REPORTABLE                  |
|------|---------------------------------|
|      | <input type="checkbox"/> Delete |

**2(b) THIS ACQUISITION IS (put an "X" in all the boxes that apply)**

- |                                                                                                                                  |                                                                    |
|----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------|
| <input type="checkbox"/> an acquisition of assets                                                                                | <input type="checkbox"/> a consolidation (see § 801.2)             |
| <input type="checkbox"/> a merger (see § 801.2)                                                                                  | <input type="checkbox"/> an acquisition of voting securities       |
| <input type="checkbox"/> an acquisition subject to § 801.2 (e)                                                                   | <input type="checkbox"/> a secondary acquisition                   |
| <input type="checkbox"/> a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50) | <input type="checkbox"/> an acquisition subject to § 801.31        |
| <input type="checkbox"/> an acquisition subject to § 801.30 (specify type)                                                       | <input type="checkbox"/> an acquisition of non-corporate interests |
|                                                                                                                                  | <input type="checkbox"/> other (specify)                           |

**2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED  
(acquiring person only in an acquisition of voting securities)**

- ☐ \$50 million (as adjusted)
 ☐ \$100 million (as adjusted)
 ☐ \$500 million (as adjusted)
 ☐ 25% (see Instructions) (as adjusted)
 ☐ 50%
 ☐ N/A

|                                                                                                        |                                                                                                              |                                                                                  |
|--------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| <b>2(d)(i) VALUE OF VOTING SECURITIES<br/>ALREADY HELD (\$MM)</b>                                      | <b>(v) VALUE OF NON-CORPORATE<br/>INTERESTS ALREADY HELD (\$MM)</b>                                          |                                                                                  |
| \$                                                                                                     | \$                                                                                                           |                                                                                  |
| <b>(ii) PERCENTAGE OF VOTING SECURITIES<br/>ALREADY HELD</b>                                           | <b>(vi) PERCENTAGE OF NON-CORPORATE<br/>INTERESTS ALREADY HELD</b>                                           |                                                                                  |
| %                                                                                                      | %                                                                                                            |                                                                                  |
| <b>(iii) TOTAL VALUE OF VOTING<br/>SECURITIES TO BE HELD AS A RESULT<br/>OF THE ACQUISITION (\$MM)</b> | <b>(vii) TOTAL VALUE OF NON-CORPORATE<br/>INTERESTS TO BE HELD AS A RESULT OF<br/>THE ACQUISITION (\$MM)</b> | <b>(ix) VALUE OF ASSETS TO BE HELD AS<br/>A RESULT OF THE ACQUISITION (\$MM)</b> |
| \$                                                                                                     | \$                                                                                                           | \$                                                                               |
| <b>(iv) TOTAL PERCENTAGE OF VOTING<br/>SECURITIES TO BE HELD AS A RESULT OF<br/>THE ACQUISITION</b>    | <b>(viii) TOTAL PERCENTAGE OF NON-<br/>CORPORATE INTERESTS TO BE HELD AS<br/>A RESULT OF THE ACQUISITION</b> | <b>(x) AGGREGATE TOTAL VALUE (\$MM)</b>                                          |
| %                                                                                                      | %                                                                                                            | \$                                                                               |

|                                    |      |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

|                     |         |                    |         |
|---------------------|---------|--------------------|---------|
| ACQUIRING UPE(S)    | Add Row | ACQUIRED UPE(S)    | Add Row |
| NAME                | Delete  | NAME               | Delete  |
| ADDRESS             |         | ADDRESS            |         |
| ADDRESS LINE 2      |         | ADDRESS LINE 2     |         |
| CITY, STATE         |         | CITY, STATE        |         |
| ZIP CODE, COUNTRY   |         | ZIP CODE, COUNTRY  |         |
| ACQUIRING ENTITY(S) | Add Row | ACQUIRED ENTITY(S) | Add Row |
| NAME                | Delete  | NAME               | Delete  |
| ADDRESS             |         | ADDRESS            |         |
| ADDRESS LINE 2      |         | ADDRESS LINE 2     |         |
| CITY, STATE         |         | CITY, STATE        |         |
| ZIP CODE, COUNTRY   |         | ZIP CODE, COUNTRY  |         |

TRANSACTION DESCRIPTION

3(b) SUBMIT A COPY OF THE MOST RECENT VERSION OF THE CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)  
(IF SUBMITTING PAPER, DO NOT ATTACH THE DOCUMENT TO THIS PAGE) ATTACHMENT NUMBER

NAME OF PERSON FILING NOTIFICATION

DATE

**ITEM 4**

PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (*See Item by Item instructions*). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

**4(a) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION**

☐ None

CENTRAL INDEX  
KEY NUMBER

[Add Row](#)

|  |                        |
|--|------------------------|
|  | <a href="#">Delete</a> |
|--|------------------------|

**4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS**

☐ None

ATTACHMENT OR  
REFERENCE NUMBER

[Add Row](#)

|  |                        |
|--|------------------------|
|  | <a href="#">Delete</a> |
|--|------------------------|

**4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS**

☐ None

ATTACHMENT OR  
REFERENCE NUMBER

[Add Row](#)

|  |                        |
|--|------------------------|
|  | <a href="#">Delete</a> |
|--|------------------------|

**4(d) ADDITIONAL DOCUMENTS**

☐ None

ATTACHMENT OR  
REFERENCE NUMBER

[Add Row](#)

|  |                        |
|--|------------------------|
|  | <a href="#">Delete</a> |
|--|------------------------|

|                                    |      |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 5

5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE

Check None at the bottom of the page and provide explanation if you are not reporting revenue

| 6-DIGIT<br>INDUSTRY CODE<br>AND/OR<br>10-DIGIT<br>PRODUCT CODE | DESCRIPTION | YEAR                                        | TOTAL DOLLAR<br>REVENUES (\$MM) |
|----------------------------------------------------------------|-------------|---------------------------------------------|---------------------------------|
| <div>Add Row</div>                                             | Attachment  | <div><input type="checkbox"/> Overlap</div> | <div>Delete</div>               |

NONE ☐ (PROVIDE EXPLANATION)



|                                                                                                               |                                                           |
|---------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|
| NAME OF PERSON FILING NOTIFICATION                                                                            | DATE                                                      |
| 5(b) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY | <input checked="checked" type="checkbox"/> Not Applicable |

5(b)(i) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE

Attachment:

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

Attachment:

5(b)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE

Attachment:

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)

| <input type="button" value="Add Row"/> |             | Attachment:                           |
|----------------------------------------|-------------|---------------------------------------|
| CODE                                   | DESCRIPTION | <input type="button" value="Delete"/> |
|                                        |             |                                       |

|                                    |      |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

Attachment:

Add Row

| NAME | CITY | STATE | COUNTRY |
|------|------|-------|---------|
|      |      |       |         |

Delete

6(b) HOLDERS OF PERSON FILING NOTIFICATION

Attachment:

Add Row

| ISSUER/<br>UNINCORPORATED ENTITY | SHAREHOLDER/<br>INTEREST HOLDER | HQ ADDRESS | % HELD |
|----------------------------------|---------------------------------|------------|--------|
|                                  |                                 |            |        |

Delete

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

Attachment:

Add Row

| FILING PERSON | ISSUER/UNINCORPORATED ENTITY | % HELD |
|---------------|------------------------------|--------|
|               |                              |        |

Delete

|                                    |      |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

**ITEM 7**

## OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION

☐ None

|         |              |
|---------|--------------|
| Add Row | Sort by Code |
|---------|--------------|

| CODE | DESCRIPTION |
|------|-------------|
|      |             |

Delete

7(b) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

|         |              |
|---------|--------------|
| Add Row | Sort by Code |
|---------|--------------|

| CODE | GEOGRAPHIC MARKET INFORMATION |
|------|-------------------------------|
|      |                               |

Delete

|                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | DATE |
| <b>ITEM 8</b> <span style="float: right; font-size: small;">Missing Mandatory Items for Submission:</span><br>PRIOR ACQUISITIONS (ACQUIRING PERSON ONLY) <span style="float: right; font-size: x-small;">Add Row</span> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |      |
| NAICS Code                                                                                                                                                                                                              | <div style="display: flex; justify-content: space-between; align-items: center;"> <span style="font-size: x-small;">Add NAICS</span> <span style="font-size: x-small;">Sort by Code</span> </div> <div style="border: 1px solid black; height: 15px; margin-top: 2px;"></div> <div style="display: flex; justify-content: space-between; align-items: center;"> <span style="font-size: x-small;">Delete NAICS</span> <span style="font-size: x-small;">Delete</span> </div> |      |
| Acquired Entity                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |      |
| Former HQ Address                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |      |
| Acquisition Type                                                                                                                                                                                                        | <input type="checkbox"/> Securities <input type="checkbox"/> Assets <input type="checkbox"/> Non Corporate Interests    Date of Acquisition:                                                                                                                                                                                                                                                                                                                                 |      |
| Notes                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |      |

**CERTIFICATION**

This **NOTIFICATION AND REPORT FORM**, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

|                             |       |
|-----------------------------|-------|
| NAME (Please print or type) | TITLE |
| SIGNATURE                   | DATE  |

Subscribed and sworn to before me at the

City of \_\_\_\_\_, State of \_\_\_\_\_

[SEAL]

this \_\_\_\_\_ day of \_\_\_\_\_, the year \_\_\_\_\_

Signature \_\_\_\_\_

My Commission expires \_\_\_\_\_

|                                                                          |      |
|--------------------------------------------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION                                       | DATE |
| <b>16 C.F.R. Part 803 - Appendix</b>                                     |      |
| <b>NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS</b> |      |
| Approved by OMB<br>3084-0005                                             |      |

**Attach the Affidavit required by § 803.5 to the Form.**

**THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS**

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. §18a. The maximum daily civil penalty amount is listed in 16 C.F.R. §1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

**DISCLOSURE NOTICE** - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premarmer Notification Office, Federal Trade Commission, 400 7th St. SW, Room #5301, Washington, DC 20024  
and  
Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, 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. That number is 3084-0005, which also appears above.

**Privacy Act Statement**--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

**This page may be omitted when submitting the Form.**

|                                    |      |
|------------------------------------|------|
| NAME OF PERSON FILING NOTIFICATION | DATE |
|------------------------------------|------|

ENDNOTES

Add Endnote

| ENDNOTE NUMBER | PERTAINING TO | ENDNOTE TEXT |        |
|----------------|---------------|--------------|--------|
|                |               |              | Delete |

NAME OF PERSON FILING NOTIFICATION

DATE

**ATTACHMENTS**[Add Attachment](#)

AttachTotal:

| ATTACHMENT<br>NUMBER | ATTACHMENT DESCRIPTION |             | Delete |
|----------------------|------------------------|-------------|--------|
|                      |                        | DESCRIPTION |        |
|                      |                        |             |        |
|                      | ATTACHED TO ITEM       |             |        |

- 9. Revise Appendix B to part 803 to read as follows:

# **ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions**

## **INSTRUCTIONS**

OMB: 3084-0005

## **GENERAL**

The Notification and Report Form ("the Form") is required to be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). These instructions specify the information that must be provided in response to the items on the Form.

### **Information**

The central office for information and assistance concerning the Form and the Rules is:

Premier Notification Office  
Federal Trade Commission, Room #5301  
400 7<sup>th</sup> Street, S.W.  
Washington, D.C. 20024  
Phone: (202) 326-3100  
E-mail: HSRhelp@ftc.gov

Copies of the Form, Instructions and Rules as well as information to assist in completing the Form are available at the [PNO website](#).

### **Definitions**

The definitions used in this Form are set forth in the Rules. See [Statute, Rules and Formal Interpretations](#) for copies of the Hart-Scott-Rodino Act ("the Act"), the Rules, and the Federal Register Notices issuing the Rules and Rule amendments ("Statements of Basis and Purpose").

The term "documentary attachments" refers only to materials submitted in response to Item 3(b), Item 4 and to submissions pursuant to § 803.1(b) of the Rules.

The terms "person filing" or "filing person" mean an ultimate parent entity ("UPE") and its associates. Every person will have at least one UPE, and a person may be the same as its UPE. Not every person will have associates, but when a person has associates, the person will not be the same as its UPE(s). (See § 801.1(a)(1) and § 801.1(d)(2)).

### **Filing**

Parties should file the completed Form, together with all documentary attachments, with the Premier Notification Office ("PNO") of the Federal Trade Commission ("FTC") and the Premier Unit of the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies"). Filers have the option of submitting a [DVD filing](#) or a [paper filing](#). Filings should be submitted to:

Premier Notification Office  
Federal Trade Commission, Room #5301  
400 7<sup>th</sup> Street, S.W.  
Washington, D.C. 20024

and

Department of Justice  
Antitrust Division  
Premier and Division Statistics Unit  
450 Fifth Street, N.W., Suite 1100  
Washington, D.C. 20530

If one or both delivery sites are unavailable, the Agencies may announce alternate sites for delivery through the media and, if possible, at the [PNO website](#).

### **If submitting a DVD filing**

- 1) Provide the FTC with:

**TWO (2)** DVDs, each containing the Form, affidavit, certification and all documentary attachments, along with the original hard copies of the cover letter, certification and affidavit.

- 2) Provide DOJ with:

**TWO (2)** DVDs containing the same content as above, along with **THREE (3)** hard copies of the cover letter.

The Form must be a searchable PDF document. All other files must be in searchable PDF or MS Excel spreadsheet format and saved in color, if applicable. This includes the affidavit and certification.

Label each DVD with the name of the person filing, the name of a contact person and that person's phone number. Leave space on the DVD for the Agencies to write the assigned transaction number and date of receipt.

If the DVD or files contain viruses, passwords, or are not readable, the filing will not be accepted and the waiting period will not start.

For further instructions on DVD filing and specific DVD requirements, go to [HSR Resources](#) on the [PNO website](#).

### **If submitting a paper filing**

- 1) Provide the FTC with:

**ONE (1)** original and **ONE (1)** copy of the Form, certification page and affidavit, along with an original cover letter and **ONE (1)** set of documentary attachments.

- 2) Provide DOJ with:

**TWO (2)** copies of the Form, certification page and affidavit, along with **THREE (3)** copies of the cover letter, and **ONE (1)** set of documentary attachments.

### **Affidavits**

Affidavit(s) are required by § 803.5 and must attest to the good faith of the persons filing to complete the transaction. Affidavits must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring or acquired person, the affidavit must still attest to the good faith of the UPE.

**In non-§ 801.30 transactions**, the affidavit(s) (submitted by both persons filing) must attest that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of the person filing notification to complete the transaction. (See § 803.5(b)).

**In § 801.30 transactions**, the affidavit (submitted only by the acquiring person) must attest:

- 1) that the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;
- 2) in the case of a tender offer, that the intention to make the tender offer has been publicly announced; and



- 3) the good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

- 1) the identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;
- 2) the specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;
- 3) the fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;
- 4) the anticipated date of receipt of such notification by the Agencies; and
- 5) the fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. (See § 803.5(a)).

#### Responses

Enter the name of the person filing notification in Item 1(a) on page 1 of the Form, and enter the same name and the date on which the Form is completed at the top of each page of the Form.

If there is insufficient room on the Form for a response to a particular item, attach "additional pages" behind that item on the Form. Filers must submit a complete set of additional pages within each copy of the Form.

Each additional page should identify, at the top of the page, the name of the person filing notification, the date on which the Form is completed and the item to which it is addressed.

Voluntary submissions pursuant to § 803.1(b) should be identified as V-1, V-2, etc.

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars.

#### Limited Response

The acquired person should limit its response in Items 5-7:

- 1) in the case of an acquisition of assets, to the assets being acquired;
- 2) in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such acquired entities; and
- 3) in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) whose non-corporate interests are being acquired and all entities controlled by such acquired entities.

Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b)).

Information need not be supplied regarding assets, voting securities or non-corporate interests currently being acquired

when their acquisition is exempt under the Act or Rules. (See § 803.2(c)).

#### Year

All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

#### North American Industry Classification System (NAICS) and North American Product Classification System (NAPCS) Data

The Form requests "dollar revenues" for non-manufactured and manufactured products with respect to operations conducted within the United States, and for products manufactured outside of the United States and sold into the United States. (See § 803.2(d)). Filing persons must submit data by 6-digit NAICS code to reflect both non-manufacturing and manufacturing dollar revenues. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must also submit data by 10-digit NAPCS code. (See Item 5 below).

In reporting information by 6-digit NAICS code, refer to the *North American Industry Classification System - United States, 2017* published by the Executive Office of the President, Office of Management and Budget.

In reporting information by 10-digit NAPCS code, refer to the concordance tables between 2012 product codes and 2017 NAPCS-based product codes published by the Bureau of the Census.

Information regarding NAICS and NAPCS is available at [www.census.gov](http://www.census.gov). This site also provides assistance in choosing the proper code(s) for reporting in Item 5 of the Form.

#### Thresholds

Filing fee and notification thresholds are adjusted annually pursuant to 15 U.S.C. § 18A(a)(2)(A) based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). The current threshold values can be found at [Current Filing Thresholds](#).

## END OF GENERAL SECTION

[Online Style Sheet for the Form](#)

[Online Tips for the Form](#)

## THE FORM - ITEM BY ITEM

**Fee Information**

The fee for filing the Form is based on the aggregate total value of assets, voting securities and controlling non-corporate interests to be held as a result of the acquisition:

| Value of assets, voting securities and controlling non-corporate interests to be held | Fee Amount |
|---------------------------------------------------------------------------------------|------------|
| greater than \$50 million (as adjusted) but less than \$100 million (as adjusted)     | \$45,000   |
| \$100 million (as adjusted) or greater but less than \$500 million (as adjusted)      | \$125,000  |
| \$500 million or greater (as adjusted)                                                | \$280,000  |

For current thresholds and fee information, see the [PNO website](#).

**Amount Paid**

Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges.

**Payer Identification**

Provide the payer's name and 9-digit Taxpayer Identification Number (TIN). If the payer is a natural person with no TIN, provide the natural person's social security number.

**Method of Payment**

The preferred method of payment is by electronic wire transfer (EWT). For EWT payments, provide the EWT confirmation number and the name of the financial institution from which the EWT is being sent. If the EWT confirmation number is not available at the time of filing, provide this information to the PNO within two business days of filing.

In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the [PNO website](#) on the [Filing Fee Information](#) page.

There are now specific, limited criteria for paying by certified check. Please see the [Filing Fee Information](#) page for details.

**Corrective Filings**

Put an X in the appropriate box to indicate whether the notification is a corrective filing (i.e., an acquisition that has already taken place without filing, in violation of the statute). See [Procedures for Submitting Post-Consummation Filings](#) for more information on how to proceed in the case of a corrective filing.

**Cash Tender Offer**

Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

**Bankruptcy**

Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or by a debtor-in-possession for a transaction that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

**Early Termination**

Put an X in the "yes" box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18A(b)(2), and on the [PNO website](#). Note that if either party in any transaction requests early termination, it may be granted and published.

**Transactions Subject to International Antitrust Notification**

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority. Response to this item is voluntary.

**Index of Hyperlinks in these Instructions:**

[PNO website](https://www.ftc.gov/enforcement/premerger-notification-program): <https://www.ftc.gov/enforcement/premerger-notification-program>

[Statute, Rules and Formal Interpretations](https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations): <https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations>

[HSR Resources](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources>

[Current Filing Thresholds](https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds): <https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>

[Online Style Sheet for the Form](https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions/style-sheet): <https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions/style-sheet>

[Online Tips for the Form](https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf): [https://www.ftc.gov/system/files/attachments/form-instructions/hsr\\_form\\_tip\\_sheet\\_1.0.5.pdf](https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf)

[Filing Fee Information](https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information): <https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information>

[Procedures for Submitting Post-Consummation Filings](https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations): <https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations>

[Online Tips for Item 4\(c\)](https://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf): <https://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf>

[Online Tips for Item 4\(d\)](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d>

[Online Tips for Item 5](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5>

[Online Tips for Item 6](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6-hsr-form): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6-hsr-form>

[Online Tips for Item 7](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-7-hsr-form): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-7-hsr-form>

## ITEM 1

**Item 1(a)**

Provide the name, headquarters address and website (if one exists) of the person filing notification. A person includes associates, but not every person will have associates. In the case of a person with associates, the person filing is the entity that manages the associates ("managing entity") as defined by § 801.1(d)(2). (See § 801.1(a)(1) and § 801.1(d)(2)).

**Item 1(b)**

Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2).

**Item 1(c)**

Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, or other (specify). If the person is a managing entity, indicate the UPE making the acquisition. Indicate if a UPE is filing on behalf of the managing entity. (See § 801.1 and § 801.1(d)(2)).

**Item 1(d)**

Put an X in the appropriate box to indicate whether data furnished in Item 5 is by calendar year or fiscal year. If fiscal year, specify the time period.

**Item 1(e)**

Put an X in the appropriate box to indicate if the Form is being filed on behalf of the UPE by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if the Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the filing person named in Item 1(a) of the Form.

**Item 1(f)**

For the acquiring person, if an entity other than the UPE listed in Item 1(a) is making the acquisition, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above.

For the acquired person, if the assets, voting securities or non-corporate interests of an entity other than the UPE listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above.

**Item 1(g)**

Provide the name and title, firm name, address, telephone number, and e-mail address of the primary and secondary individuals to contact regarding the Form. A second contact person is required. (See § 803.20(b)(2)(ii)).

**Item 1(h)**

Foreign filing persons must provide the name, firm name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii)).

Note: The Form has fields for fax numbers in Item 1. Providing fax numbers is no longer necessary. The fields will be deleted during the next update of the HSR Form.

END OF ITEM 1

## ITEM 2

**Item 2(a)**

Provide the names of all UPEs of acquiring and acquired persons that are parties to the transaction, whether or not they are required to file notification. If a person is not required to file, check the non-reportable box.

**Item 2(b)**

Put an X in all the boxes that apply to the transaction.

**Item 2(c)**

**This item should only be completed by the acquiring person where voting securities are being acquired.** If more than voting securities are being acquired, respond to this item only regarding voting securities. Put an X in the box to indicate the highest applicable threshold for which notification is being filed: \$50 million (as adjusted), \$100 million (as adjusted), \$500 million (as adjusted), 25% (if the value of voting securities to be held is greater than \$1 billion, as adjusted), or 50%. (See § 801.1(h)).

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer, valued in excess of \$500 million (as adjusted) would cross the 50% notification threshold, not the \$500 million (as adjusted) threshold.

**Item 2(d)**

Provide the requested information on assets, voting securities and non-corporate interests. If a combination of assets, voting securities and/or non-corporate interests are being acquired and allocation is not possible, note such information in an endnote.

For determining percentage of voting securities, evaluate total voting power per § 801.12.

For determining percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(i).

**Item 2(d)(i)**

State the value of voting securities already held. (See § 801.10).

**Item 2(d)(ii)**

State the percentage of voting securities already held. (See § 801.12).

**Item 2(d)(iii)**

State the total value of voting securities to be held as a result of the acquisition. (See § 801.10).

**Item 2(d)(iv)**

State the total percentage of voting securities to be held as a result of the acquisition. (See § 801.12).

**Item 2(d)(v)**

State the value of non-corporate interests already held. (See § 801.10).

**Item 2(d)(vi)**

State the percentage of non-corporate interests already held. (See § 801.1(b)(1)(i)).

**Item 2(d)(vii)**

State the total value of non-corporate interests to be held as a result of the acquisition. (See § 801.10).

## ITEM 2 cont.

**Item 2(d)(viii)**

State the total percentage of non-corporate interests to be held as a result of the acquisition. (See §§ 801.10 and 801.1(b)(1)(ii)).

**Item 2(d)(ix)**

State the value of assets to be held as a result of the acquisition. (See § 801.10).

**Item 2(d)(x)**

State the aggregate total value of assets, voting securities and non-corporate interests of the acquired person to be held as a result of the acquisition. (See §§ 801.10, 801.12, 801.13 and 801.14).

## END OF ITEM 2

**Most Common Mistakes When Completing the HSR Form**

- Noncompliant affidavit
- Missing contact information in Item 1(g)
- Failure to describe target in Item 3(a)
- Incomplete privilege log
- Failure to properly identify authors and recipients of Item 4c/4d documents
- Failure to properly round revenues in Item 5 to nearest tenth of a million and failure to list in ascending order
- Failure to provide required geographic information (e.g., state, county, and city or town) in Item 7(c)(iv)(b)
- Failure to provide the total number of states and territories in response to Item 7(c)

## ITEM 3

**Item 3(a)**

At the top of Item 3(a), list the name and mailing address of each acquiring and acquired person, and acquiring and acquired entity, that are party to the transaction whether or not required to file notification. It is not necessary to list every subsidiary wholly-owned owned by an acquired entity.

In the Transaction Description section, briefly describe the transaction, indicating whether assets, voting securities or non-corporate interests (or some combination) are to be acquired. Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise a business operation. Also, indicate what consideration will be received by each party and the scheduled consummation date of the transaction.

If any attached transaction documents use coded names to refer to the parties, please provide an index identifying the codes.

If there are additional filings, such as shareholder backside filings, associated with the transaction, identify those. Also, identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

**Item 3(b)**

Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities or non-corporate interests are to be acquired. Also furnish agreements not to compete and other agreements between the parties. Do not submit schedules and the like unless they contain agreements not to compete, other agreements between the parties, or other important terms of the transaction. For purposes of Item 3(b), responsive documents must be submitted; identifying an internet address or providing a link is not sufficient.

Documents that constitute the agreement(s) (e.g., a Letter of Intent, Merger Agreement, Purchase and Sale Agreement) must be executed, while agreements not to compete may be provided in draft form if that is the most recent version.

If parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement, if one exists.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. § 363 do not require an executed agreement or letter of intent. For bankruptcies, provide the order from the bankruptcy court.

## END OF ITEM 3

**ITEM 4****Item 4(a)**

**Acquiring persons:** Provide the names of all entities within the person filing notification, including all UPEs, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity. Responses must be organized by UPE and entity within each UPE.

**Acquired persons:** provide the names of all entities within the selling UPE, including the UPE, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

**Item 4(b)**

**Acquiring persons:** Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification. The acquiring person should also provide the most recent reports of the acquiring entity(s) and any controlled entity whose dollar revenues contribute to an overlap reported in Item 7. Responses must be organized by UPE and by entity within each UPE. If some of the UPEs or entities do not prepare separate financial statements, explain how their financial information is consolidated in the financial information being submitted.

**Acquired persons:** Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the selling UPE. The acquired person should also provide the most recent reports of the acquired entity(s).

**Natural persons** need only provide the most recent reports for the highest level entity(s) they control. Do not provide personal balance sheets or tax returns.

If the most recent reports do not show sales or assets sufficient to meet the size of person test, and the size of person test is relevant given the size of the transaction, the filing person must stipulate in Item 4(b) that it meets the test.

Note that the person filing notification may incorporate a document by reference to an internet address directly linking to the document. (See § 803.2(e)).

**Items 4(c) and 4(d)**

For each document responsive to Items 4(c) and 4(d), provide the:

- 1) document's title;
- 2) date of preparation; and
- 3) name and title of each individual who prepared the document.

If a specific date is not available, indicate the month and year the document was prepared.

If a large group of people prepared the document, list all the authors and their titles, identifying the principal authors.

Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. If a third party prepared the document, the date of preparation and the name of the third party will suffice.

**Numbering**

Number each document provided in response to Items 4(c) and 4(d). Number 4(c) documents 4(c)-1, 4(c)-2, 4(c)-3, etc. Likewise, number 4(d) documents 4(d)-1, 4(d)-2, 4(d)-3, etc., regardless of the three sub-categories within Item 4(d). If providing only one document, identify it as 4(c)-1 or 4(d)-1.

When submitting a document responsive to both 4(c) and 4(d), list it only once, under 4(c) or 4(d). If a document is responsive to both 4(c) and 4(d), do not cross-reference.

**Privilege**

Note that if the filing person withholds or redacts portions of any document responsive to Items 4(c) and 4(d) based on a claim of privilege, the person must provide a statement of reasons for non-compliance (a "privilege log") detailing the claim of privilege for each withheld or redacted document. (See § 803.3(d)).

For each document, include the:

- 1) title of the document;
- 2) its author;
- 3) author's title/position;
- 4) addressee;
- 5) addressee's title/position;
- 6) date;
- 7) subject matter;
- 8) all recipients of the original and any copies;
- 9) recipients' titles/positions;
- 10) document's present location; and
- 11) who has control over it.

Additionally, the filing person must state the factual basis supporting the privilege claim in sufficient detail to enable staff to assess the validity of the claim for each document without disclosing the protected information.

If a privileged document was circulated to a group, such as the Board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested. If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

When creating a privilege log, use a separate numbering system for withheld documents, such as P-1, P-2, etc. Redacted documents should also be listed in a separate log that complies with § 803.3(d).

**Item 4(c)**

Provide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets,

## ITEM 4 cont.

potential for sales growth or expansion into product or geographic markets.

**Item 4(d)****Item 4(d)(i)**

Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

**Item 4(d)(ii)**

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

**Item 4(d)(iii)**

Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

## END OF ITEM 4

**Tip for Item 4**

If there is insufficient room on the Form for a response, attach "additional pages" behind that item on the Form. (See Responses on page II).

[Online Tips for Item 4\(c\)](#)

[Online Tips for Item 4\(d\)](#)

## ITEMS 5 THROUGH 7

**Limited response for acquired person.** For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of:

- 1) assets, to the assets to be acquired;
- 2) voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer; and/or
- 3) non-corporate interests, to the unincorporated entity(s) being acquired and all entities controlled by such unincorporated entity(s).

A person filing as both acquiring and acquired persons may be required to provide a separate response to Items 5 through 7 in each capacity so that it can properly limit its response as an acquired person. (See §§ 803.2(b) and (c)).

## ITEM 5

This item requests information regarding dollar revenues. (See NAICS and NAPCS Data section on page II). All persons must submit all dollar revenues at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filers must also submit revenue by 10-digit NAPCS code. Concordance tables between 2012 10-digit NAICS codes and 10-digit 2017 NAPCS codes are available at: <https://www.census.gov/programs-surveys/economic-census/guidance/understanding-napcs.html>.

Responses must be organized by UPE and entity within each UPE. List all NAICS and NAPCS codes in ascending order.

Acquiring persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time the Form is prepared. Acquired persons filing notification should include the total dollar revenues for all entities included within the acquired entity at the time the Form is prepared. If no dollar revenues are reported, check the "None" box and provide a brief explanation.

**Item 5(a)**

Provide 6-digit NAICS industry data concerning the aggregate U.S. operations of the person filing notification for the most recent year in all NAICS Sectors in which the person engaged. If the dollar revenues for a non-manufacturing NAICS code totaled less than one million dollars in the most recent year, that code may be omitted from Item 5(a).

Additionally, provide 10-digit NAPCS product code data for each product code within all manufacturing NAICS Sectors (31-33) in which the person engaged in the U.S., including dollar revenues for each product manufactured outside the U.S. but sold into the U.S. Sales of any manufactured product should be reported in a manufacturing code, even if sold through a separate warehouse or retail establishment.

If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS codes and 10-digit NAPCS codes may be provided.

Check the Overlap box for every 6-digit manufacturing and non-manufacturing NAICS code and every 10-digit NAPCS code in which both persons generate dollar revenues.

## ITEM 5 cont.

**Item 5(b)**

**Complete only if the acquisition is the formation of a joint venture corporation or unincorporated entity.** (See §§ 801.40 and 801.50). If the acquisition is not the formation of a joint venture, check the "Not Applicable" box.

**Item 5(b)(i)**

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

**Item 5(b)(ii)**

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

**Item 5(b)(iii)**

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

**Item 5(b)(iv)**

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing, also specify each 10-digit NAPCS product code in which it will derive dollar revenues.

## END OF ITEM 5

**Tip for Item 5**

Remember, all financial information should be expressed in millions of dollars, rounded to the nearest one-tenth of a million dollars.

**Online Tips for Item 5**

## ITEM 6

**An acquired person does not complete Item 6 if the transaction involves only the acquisition of assets.** If the transaction involves a mix of assets along with voting securities and/or non-corporate interests, the acquired person must complete Item 6 as related to the voting securities and non-corporate interests.

**Item 6(a)**

**Subsidiaries of filing person.** List the name, city and state/country of all U.S. entities, and all foreign entities that have sales in or into the U.S., that are included within the person filing notification. Responses must be organized by UPE and by entity within each UPE. Entities with total assets of less than \$10 million may be omitted. Alternatively, the filing person may report all entities within it.

**Item 6(b)**

**Minority shareholders.** For the acquired entity(s) and, for the acquiring person, the managing entity, all UPEs, and the acquiring entity(s) or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within that UPE, list the name and headquarters mailing address of each shareholder that holds 5% or more but less than 50% of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person. Responses must be organized by UPE and entity within each UPE. (See § 801.1(c))

For limited partnerships, only the general partner(s), regardless of percentage held, should be listed.

**Item 6(c)**

**Minority holdings of filing person.** If the person filing notification holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, list the unincorporated entity and the percentage of non-corporate interests held.

The acquiring person should limit its response, based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. The acquiring person may rely on its regularly prepared financials that its investments, provided the financials are no more than three months old. Responses must be organized by UPE and by entity within each UPE.

The acquired person should limit its response, based on its knowledge or belief, to entities that derive dollar revenues in the same 6-digit NAICS industry code as the acquiring person.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Item 6(c), it is permissible for the acquiring person to list all entities in which it or its associate(s) holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings in those entities that have total assets of less than \$10 million may be omitted.

## END OF ITEM 6

**Tip for Item 6(c)**

Remember, if NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed.

**Online Tips for Item 6****ITEM 7**

If, to the knowledge or belief of the person filing notification, the acquiring person derived any amount of dollar revenues (even if omitted from Item 5) in the most recent year from operations:

- 1) in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year; or
- 2) in which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

Responses must be organized by UPE and by entity within each UPE.

**Item 7(a)****Industry Code Overlap Information**

Provide the 6-digit NAICS industry code and description for the industry.

**Item 7(b)****Geographic Market Information**

Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Note that except in the case of those NAICS industries in the Sectors and Subsectors mentioned in Item 7(c)(iv)(b), the person filing notification may respond with the word "national" if business is conducted in all 50 states.

**Item 7(b)(i)****NAICS Sectors 31-33**

For each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a), list the relevant geographic information in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold). Except for industries covered by Item 7(c)(iv)(b), the relevant geographic information is all states or, if desired, portions thereof.

**Item 7(b)(ii)****NAICS Sector 42**

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a), list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

**Item 7(b)(iii)****NAICS Industry Group 5241**

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a), list the state(s) in which the person filing notification is licensed to write insurance.



## ITEM 7 cont.

## Item 7(b)(iv)(a)

Other NAICS Sectors

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 11 agriculture, forestry, fishing and hunting
- 21 mining
- 22 utilities
- 23 construction
- 48-49 transportation and warehousing
- 511 publishing industries
- 515 broadcasting
- 517 telecommunications
- 71 arts, entertainment and recreation

## Item 7(b)(iv)(b)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, provide the address, arranged by state, county and city or town, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

- 2123 nonmetallic mineral mining and quarrying
- 32512 industrial gases
- 32732 concrete
- 32733 concrete products
- 44-45 retail trade, except 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores)
- 512 motion picture and sound recording industries
- 521 monetary authorities - central bank
- 522 credit intermediation and related activities
- 532 rental and leasing services
- 62 health care and social assistance
- 72 accommodations and food services, except 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses)
- 811 repair and maintenance, except 8114 (personal and household goods repair and maintenance)
- 812 personal and laundry services

## Item 7(b)(iv)(c)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 442 furniture and home furnishings stores
- 443 electronics and appliance stores
- 516 internet publishing & broadcasting
- 518 internet service providers
- 519 other information services
- 523 securities, commodity contracts and other financial investments and related activities
- 5242 insurance agencies and brokerages, and other insurance related activities
- 525 funds, trusts and other financial vehicles
- 53 real estate and rental and leasing
- 54 professional, scientific and technical services
- 55 management of companies and enterprises

- 56 administrative and support and waste management and remediation services
- 61 educational services
- 7212 recreational vehicle parks and recreational camps
- 7213 rooming and boarding houses
- 813 religious, grantmaking, civic, professional, and similar organizations
- 8114 personal and household goods repair and maintenance

END OF ITEM 7

[Online Tips for Item 7](#)

## ITEM 8

This item should only be completed by the acquiring person. Determine each 6-digit NAICS industry code listed in Item 7(a), in which the acquiring person derived dollar revenues of \$1 million or more in the most recent year and in which either:

- 1) the acquired entity derived dollar revenues of \$1 million or more in the recent year (or in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive dollar revenues of \$1 million or more); or
- 2) in the case of acquired assets, to which dollar revenues of \$1 million or more were attributable in the most recent year.

For each such 6-digit NAICS industry code, list all acquisitions of entities or assets deriving dollar revenues in that 6-digit NAICS industry code made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity that had annual net sales or total assets greater than \$10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

This item pertains only to acquisitions of U.S. entities/assets and foreign entities/assets with sales in or into the U.S., i.e., with dollar revenues that would be reported in Item 5.

For each such acquisition, supply:

- 1) the 6-digit NAICS industry code (by number and description) identified above in which the acquired entity derived dollar revenues;
- 2) the name of the entity from which the assets, voting securities or non-corporate interests were acquired;
- 3) the headquarters address of that entity prior to the acquisition;
- 4) whether assets, voting securities or non-corporate interests were acquired; and
- 5) the consummation date of the acquisition.

Responses must be organized by UPE and by each entity within each UPE.

## END OF ITEM 8

## CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury.

## PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. § 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

## DISCLOSURE NOTICE

Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premier Notification Office  
Federal Trade Commission, Room #5301  
400 7th Street, S.W.  
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs  
Office of Management and Budget  
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

## END OF FORM INSTRUCTION

## BILLING CODE 6750-01-C

By direction of the Commission,  
Commissioner Chopra and Commissioner  
Slaughter dissenting.

**April J. Tabor,**  
*Acting Secretary.*

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

Statement of Commissioner Noah  
Joshua Phillips

September 18, 2020

Today, the Federal Trade Commission (the “Commission”) voted to publish for public comment a Notice of Proposed Rulemaking (“NPRM”) and an Advance Notice of Proposed Rulemaking (“ANPRM”), both relating to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (the “HSR Act”

or “HSR”).<sup>1</sup> The NPRM proposes two non-ministerial changes: (1) Broadening the filing requirement to include holdings of affiliates

<sup>1</sup> The HSR Act established the federal premerger notification program, which provides the Federal Trade Commission and the Department of Justice with information about large mergers and acquisitions before they occur. The parties may not close their deal until the waiting period outlined in the HSR Act has elapsed, or the government has granted early termination of the waiting period. Under this framework, the government may sue to block those deals it determines may violate the antitrust laws before the deals have been consummated.

of the acquirer, and (2) the creation of a new exemption, discussed below. The ANPRM poses a series of questions around several topics that may inform future efforts to update and refine the rules.

I write today to discuss the proposed exemption for *de minimis* acquisitions of voting securities, and to explain why I voted in favor of seeking comment on this proposal. In brief, the proposed exemption will carve out from the HSR Act's reporting requirements acquisitions of voting securities that leave the acquirer holding 10% or less of the issuer's total voting stock,<sup>2</sup> subject to several limitations.

The HSR Act was enacted to give the Commission and the Antitrust Division of the Department of Justice (the "Division") (collectively, the "Agencies") advance notice of mergers and acquisitions so that the Agencies could challenge anticompetitive transactions before they were consummated. Among other things, the system it established often allows the government and companies to avoid the more difficult process of "unscrambling the eggs"—separating, say, two illegally merged companies.

That is a good thing; but, like most good things, it comes at a cost. Investors must notify the target of the acquisition, wait as long as a month, and pay a fee of \$45,000 to \$280,000. That can make simple transactions much more costly, and sometimes not worth doing. The target may publicize the deal, driving up the price. Management may take defensive measures. The waiting period may change the viability of the transaction. The fees are substantial. All of that leads investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas, dampening operational and financial improvement—and, ultimately, competition. The HSR Act provides an exemption for the acquisition of 10% or less of voting securities made "solely for the purpose of investment".<sup>3</sup> But the large grey area between what the investment-only exemption clearly permits shareholders to do (e.g., just hold on to their stock) and what it clearly forbids (e.g., proposing corporate action requiring shareholder approval)<sup>4</sup> encompasses interactions with management that play a critical role in keeping corporations accountable and stoking competition.

Today, in effect, HSR operates as a tax on activities that can often be beneficial. But it is not supposed to be a tax, whether on shareholder input or mergers and acquisitions activity. It also is not supposed

to be an early-warning system for tender offers and corporate takeovers—for that we have a number of laws at the federal and state level.<sup>5</sup> And it is not supposed to be a monitoring system for equity investments generally. To the extent possible, it should not be any of those things. It should effectuate its purpose: Helping the Agencies spot transactions likely to violate the antitrust laws, so that we can stop or remedy them prophylactically.

That is why Congress gave the Commission, with the concurrence of the Division's Assistant Attorney General, the ability to exempt from premerger notification those "acquisitions, transfers, or transactions which are not likely to violate the antitrust laws".<sup>6</sup> The proposed *de minimis* exemption covers transactions that we know are not likely to do so. The HSR Act was enacted in 1976, and 44 years of experience since then have taught us that acquisitions of 10% or less of a company are extremely unlikely to raise competition concerns. According to the NPRM, the Agencies have reviewed a multitude of 10%-or-less acquisitions that do not qualify for the investment-only exemption over the last four decades; and none have warranted a challenge. For example, from fiscal year 2001 to 2017, the Agencies received 1,804 10%-or-less filings. What do these real-world data show? Only a handful of 10%-or-less acquisitions required any substantive review whatsoever, and none were challenged by the Agencies. Not one.

Thus, the proposal represents an important step in tailoring the HSR regime to its intended purpose of identifying and addressing competition issues, while simultaneously eliminating unnecessary regulatory burdens on beneficial investment activity that does not harm competition and, indeed, often promotes it.<sup>7</sup>

Four-plus decades of real world experience should go a long way towards allaying concerns that the proposed *de minimis* exemption will allow competitively troubling acquisitions to fly under the Agencies' radar. But scholarship in recent years has raised the question whether common ownership of substantial but non-controlling interests in competing companies (often by large, diversified, asset managers) has an anticompetitive effect. That debate, including its implications for antitrust policy, continues.<sup>8</sup> For now, the proposed *de minimis* exemption errs on the side of caution, excluding from its scope transactions that might implicate this

concern. (To the extent that the feared competition harms of common ownership result from the passivity of the largest shareholders, the *de minimis* exemption may help mitigate the concern by facilitating the smaller, more active, voices.<sup>9</sup>) It also does not apply to other transactions where a competitively significant relationship between the issuer of the voting securities and the acquirer claiming the exemption exists. What it does reach are transactions that, in over 40 years, have raised no competition issues.

In 1988, following complaints by investors about the negative impact HSR was having on their small stock purchases and a study that showed the Agencies had never challenged one as violating Section 7 of the Clayton Act, the FTC considered whether to exempt acquisitions of 10% or less of a company's voting securities from HSR reporting. Those problems are still with us, and the data today show the same thing. Transactions of 10% or less are just as unlikely to lessen competition today as they were 30 years ago; and small stock purchases have almost never needed even a second look. Those decades of experience speak volumes, and what they tell us is that, at great cost, the benefits of continuing to tax *de minimis* stock purchases are virtually nonexistent. We can change that.

## Statement of Commissioner Rohit Chopra

September 21, 2020

### Summary

- Premerger notification is a critical data source, but the Commission faces enormous information gaps when seeking to detect and halt anticompetitive transactions.
- While the proposed rule closes a loophole when it comes to investment manager holdings, the proposed approach to exempt a wide swath of minority stakes is concerning and adds to existing information gaps.
- The Commission needs to update the treatment of certain debt transactions when determining deal size for the purpose of premerger notification. The current approach allows dealmakers to structure anticompetitive transactions in ways that can go unreported.

In September 1976, Congress gave the Federal Trade Commission an important tool enabling it to block harmful mergers. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") requires prior notification to the antitrust agencies in advance of closing certain mergers and acquisitions.<sup>1</sup>

Prior to the HSR Act's enactment, companies could quickly "scramble the eggs" of assets and operations, or even shut down

<sup>2</sup> The 10% threshold applies to the acquirer's aggregate holdings of the issuer's voting securities. Therefore, the *de minimis* exemption does not permit those claiming it to avoid HSR review by acquiring control of an entity via a "creeping" series of acquisitions, each involving less than 10% of the firm's voting securities. Once an acquirer comes to own 10% of an issuer's voting securities, it may no longer avail itself of the exemption.

<sup>3</sup> 15 U.S.C. 18a(c)(9).

<sup>4</sup> According to this definition, "[v]oting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 CFR 801.1(i)(1) (2020).

<sup>5</sup> See, e.g., Williams Act, 15 U.S.C. 78m(d)–(e), 78n(d)–(f).

<sup>6</sup> 15 U.S.C. 18a(d)(2)(B).

<sup>7</sup> See Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Keynote Address at the Global Antitrust Economics Conference (May 31, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1524321/phillips\\_-\\_competing\\_for\\_companies\\_5-31-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf).

<sup>8</sup> See Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Taking Stock: Assessing Common Ownership, Keynote Address at the Global Antitrust Economics Conference (June 1, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1382461/phillips\\_-\\_taking\\_stock\\_6-1-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf).

<sup>9</sup> See Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Opening Remarks at FTC Hearing #8: Competition and Consumer Protection in the 21st Century: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1454690/phillips\\_-\\_ftc\\_hearing\\_8\\_opening\\_remarks\\_12-6-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1454690/phillips_-_ftc_hearing_8_opening_remarks_12-6-18.pdf).

<sup>1</sup> Clayton Act section 7A, 15 U.S.C. 18a.

functions. This made it extremely difficult for the antitrust agencies to remedy competitive harms through divestitures of assets. Years of protracted litigation to stop further damage and distortions were often the result.<sup>2</sup>

The HSR Act fundamentally changed the process of merger review by giving the antitrust agencies time to halt anticompetitive transactions before these deals closed. Today, the FTC focuses a substantial portion of its competition mission on investigating and challenging mergers reported under the HSR Act. Importantly, only a small set of transactions—the ones with the highest valuations—are subject to premerger notification. The HSR Act specifies the valuation threshold, currently set at \$94 million, which is typically adjusted upward each year. Since there are many ways to determine a deal's valuation, Congress gave the FTC broad authority to implement rules so that buyers know if they need to report their transactions and what they are required to submit with their filing. The Commission can also exempt classes of transactions and tailor filing requirements.

While premerger notification filings provide the Commission with certain nonpublic information,<sup>3</sup> gathering and analyzing market intelligence on transaction activity and competitive dynamics is a major challenge. We need to continuously assess how we can enhance our market monitoring techniques and evolve our analytical approaches.

Today, the Commission is soliciting comment on two rulemaking notices regarding our policies to implement the HSR Act's premerger notification protocols. The first publication, a Notice of Proposed Rulemaking, proposes specific rules and exemptions. While some of the proposals are helpful improvements, I respectfully disagree with our approach to exempting a broad swath of transactions from reporting. The second publication, an Advance Notice of Proposed Rulemaking, requests comment on a broad range of topics to set the stage for modernizing the premerger notification program to align with market realities. I support soliciting input to rethink our approach. I discuss each of these notices below.

### Notice of Proposed Rulemaking

The Notice of Proposed Rulemaking outlines specific amendments that the Commission is proposing to the HSR rules. The aggregation and exemption provisions are particularly noteworthy. The aggregation provisions are worthwhile, since they close a loophole and align with market realities. However, I am concerned about the exemption provisions, since we will completely lose visibility into a large set of transactions involving non-controlling stakes.

<sup>2</sup> For example, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), it took seventeen years of litigation before a divestiture finally took place.

<sup>3</sup> I agree with Commissioner Slaughter that current filing requirements, including for minority stakes, can have the beneficial effect of deterring certain anticompetitive transactions.

### Aggregation Provisions

The financial services industry is well known for using an alphabet soup of small entities, like shell companies, partnerships, and other investment vehicles, to structure deals. Even though they may be under common management by the same person or group, like a private equity fund or a hedge fund, these smaller legal entities are all treated separately under the existing rules.

The proposed aggregation provisions will help to prevent acquirers from splitting up transactions into small slices across multiple investment vehicles under their control to avoid reporting. The proposal would require investors and other buyers to add together their stakes across commonly managed funds to determine whether they need to report a transaction.

### Exemption Provisions

By creating a reporting threshold based on the value of a transaction, the law already exempts most transactions from agency review. Because of this, it is difficult to systematically track these transactions, and even harder to detect and deter those that are anticompetitive.

Now, the FTC is proposing to widen that information gap by creating a new exemption for minority stakes of 10% or less, subject to certain conditions. Importantly, the proposal is not exempting specific aspects of the reporting requirements—it is a total exemption, so the agency will receive no information whatsoever from the buyer or the seller that the transaction even occurred. This adds to the burdens and information asymmetries that the agency already faces when it comes to detecting potentially harmful transactions.<sup>4</sup>

Companies and investors purchase minority, non-controlling stakes in a firm for a number of reasons. Sometimes, buyers might start with a minority stake, with the goal—or even with a contractual option—of an outright takeover as they learn more about the company's operations. Even though they might have a small stake, they can exert outsized control. In other cases, buyers might look for minority stakes in multiple, competing firms within a sector or industry, and some or all of these acquisitions may fall below the reporting thresholds. Of course, if they are able to obtain seats on boards of directors of competing companies, this can be illegal.

Investors and buyers can only use the proposed exemption if they do not currently own stakes in firms that compete or do business with the company they plan to acquire. Since many investors might not know about the specific business dealings across companies, this may be difficult to enforce and puts more burden on the agency.

<sup>4</sup> The FTC may not be able to rely on other sources of robust data required by other agencies. For example, the Securities and Exchange Commission has proposed eliminating reporting for thousands of registered investment funds that previously detailed their holdings to the public. See Statement of SEC Comm'r Allison Herren Lee Regarding Proposal to Substantially Reduce 13F Reporting (July 10, 2020), <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

Even if one believes that transactions involving a minority stake are less likely to be illegal, there are many potential alternatives to outright elimination of reporting. Unfortunately, the rulemaking notice does not outline alternative approaches (such as tailored, simplified filing requirements or shortened waiting periods) for minority stakes.

### Advance Notice of Proposed Rulemaking

As markets evolve, it is important that the HSR Act and its implementing rules reflect those developments. The Advance Notice of Proposed Rulemaking seeks input on a wide array of market-based issues that may affect the Commission's merger oversight. One topic of particular interest is whether to include debt as part of the valuation of a transaction. Since the HSR Act's passage, corporate debt markets have grown in importance for companies competing in developed economies. Many major deals involve vast sums of borrowed money.

However, the Commission has not formally codified a view on the treatment of certain debt transactions. Instead, existing staff guidance excludes many debt transactions from the deal's overall value. This is worrisome, since it means that many potentially anticompetitive transactions can go unreported, since they may fall below the size threshold. In addition, this view has been provided informally, communicated through unofficial interpretations outside of formal rules or guidance. It will be important to take steps to collect input and codify the Commission's policies on valuation, particularly with respect to the treatment of debt, since formal guidance or rules will offer clarity and will be easier to enforce.

The Advance Notice of Proposed Rulemaking also seeks information that will lay groundwork for broader reforms to our premerger notification program. I look forward to the data and written submissions to this document.

### Conclusion

Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.<sup>5</sup> The FTC ends up missing a large number of anticompetitive mergers every year. In addition, since amendments to the HSR Act in 2000 raised the size

<sup>5</sup> Small transactions can be just as harmful to competition as large transactions notified under the HSR Act. For example, "catch and kill" acquisitions of an upstart competitor in fast-moving markets can be particularly destructive. In addition, "roll-ups," an acquisition strategy involving a series of acquisitions of small players to combine into a larger one, can have very significant negative effects on competition. See Statement of Fed. Trade Comm'r Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577783/p110014hsrannualreportchoprastatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf).

thresholds on an annual basis, the number of HSR-reportable transactions has *decreased*.

I want to commend agency staff for their work in identifying potential blind spots in the premerger reporting regime. I also want to thank state legislatures and state attorneys general for enacting and implementing their own premerger notification laws to fill in some of these gaps. For example, a new law in State of Washington has taken effect, which requires advance notice of any transactions in the health care sector, where many problematic mergers fall below the radar.<sup>6</sup>

As we conduct this examination of the HSR Act, we should identify areas where laws may need to be changed or updated, especially when we cannot fill those gaps through amendments to our rules. For example, we may need to pursue reforms to ensure that “roll ups” are reported, where a buyer might acquire a large number of small companies that may not be individually reportable. We may also need to look carefully at the length of the waiting period, to determine if it is long enough to conduct a thorough investigation. I look forward to reviewing the input to these two rulemaking notices, so that our approach reflects market realities.

### Statement of Commissioner Rebecca Kelly Slaughter

September 18, 2020

Today, the Commission voted to advance two proposals with respect to our HSR premerger notification rules. I support the broad solicitation of input in the Advance Notice of Proposed Rulemaking and the proposed aggregation provisions in the Notice of Proposed Rulemaking (NPRM). But I oppose provisions in the NPRM that would broaden the categories of transactions exempt from filing HSR notice.

I share the concerns Commissioner Chopra articulated, and write separately only to add a few points. I share the general view that we should do what we can to right-size our HSR requirements. We generally benefit when the universe of transactions that are required to file under HSR matches as closely as possible the universe of transactions that are competitively problematic. Too many filings on non-problematic transactions are an unnecessary resource drain for the agency, and too few filings on problematic transactions clearly would allow anticompetitive acquisitions to proceed unnoticed and unchallenged. I also generally agree that transaction size (the main trigger for HSR filing under current law) is not the only or even necessarily the best indicator of competitive significance.

However, I am concerned about the expanded *de minimis* exemptions in the proposal released today for two reasons: Its broadening of the black box of unseen transactions and its effect on corporate governance.

Commissioner Phillips is correct that, of the filings the agency has reviewed of sub-10% acquisitions, none have led to enforcement action. But we cannot conclude that sub-10% acquisitions could never be problematic, because we do not know if any problematic transactions were deterred from consummation for fear of disclosures that are required in a filing, nor do we know how many might fall into that category. I worry that adding exemptions broadens the category of transactions outside of the agencies’ view, and therefore share Commissioner Chopra’s preference that the agency consider something other than a full exemption.

My other concern is that expanding the *de minimis* exemptions will have profound policy effects primarily in an area outside of the FTC’s particular expertise and jurisdiction: Corporate governance. Commissioner Phillips in his statement points out the ways in which the current HSR filing requirement for non-passive acquisitions can chill investors. He notes the rules around HSR may lead “investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas, dampening operational and financial improvement—and, ultimately, competition.” Although I have not seen evidence to support his conclusion about the effect on competition, the evidence we have seen, even anecdotally, supports his assertions about investor behavior. It follows, therefore, that expanding HSR exemptions may likely change investor incentives and behavior.

These changes may ultimately be a good thing as a matter of public policy, and they might not be; the concern for me is that they would effect a public policy goal outside the realm of antitrust, and I am hesitant for the FTC unilaterally to enact rules outside the scope of our primary authority. I certainly understand that the rules as they exist today have a public policy effect outside antitrust, but they are the rules that we have, and disrupting the status quo is something that should be done only after careful consideration of and in consultation with experts on corporate governance, investor behavior, and securities law and policy.

So, I welcome comments on this NPRM from those in the corporate governance and securities community, and experts on investor behavior, to help us better understand the implications of such a change—including whether it would, as Commissioner Phillips asserts, actually improve competition.

[FR Doc. 2020–21753 Filed 11–30–20; 8:45 am]

**BILLING CODE 6750–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG–2020–0630]

RIN 1625–AA00

### Safety Zone; Bahia de Ponce, Ponce, PR

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to establish a permanent safety zone for certain waters of the Bahia de Ponce, Ponce, Puerto Rico. This action is necessary to provide for the safety of life on these navigable waters during ship-to-ship liquefied natural gas transfer operations between liquefied gas carriers. This proposed rulemaking would prohibit persons and vessels from being in the safety zone when activated unless authorized by the Captain of the Port San Juan or a designated representative. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before December 31, 2020.

**ADDRESSES:** You may submit comments identified by docket number USCG–2020–0630 using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email Lieutenant Natallia Lopez, Sector San Juan Prevention Department, Waterways Management Division, U.S. Coast Guard; telephone 787–729–2380, email [Natallia.M.Lopez@uscg.mil](mailto:Natallia.M.Lopez@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
COTP Captain of the Port  
DHS Department of Homeland Security  
FR Federal Register  
LG Liquefied Gas  
LNG Liquefied Natural Gas  
NPRM Notice of proposed rulemaking  
PR Puerto Rico  
§ Section  
U.S.C. United States Code

<sup>6</sup> See Healthcare Transaction Notification Requirement, WASH. STATE OFF. OF THE ATT’Y GEN. (last visited Sept. 16, 2020), <https://www.atg.wa.gov/healthcare-transactions-notification-requirement>; see also S.H.B. 1607, 66th Leg., Reg. Sess. (Wash. 2019).

## II. Background, Purpose, and Legal Basis

On April 20, 2020, New Fortress Energy submitted a request to begin conducting ship-to-ship liquefied natural gas (LNG) transfer operations in the approximate location of three nautical miles south of Ponce, Puerto Rico (PR). Coast Guard Sector San Juan engaged with local stakeholders and determined the proposed location could accommodate regular anchoring and ship-to-ship LNG transfer operations between liquefied gas (LG) carriers. The Captain of the Port San Juan (COTP) has determined that potential hazards associated with ship-to-ship LNG transfer operations between LG carriers would be a safety concern for anyone within 100-yards of the location of the transfer operations.

The purpose of this rulemaking is to establish a permanent safety zone to ensure the safety of vessels and the navigable waters during ship-to-ship LNG transfer operations between LG carriers. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

## III. Discussion of Proposed Rule

The COTP is proposing to establish a permanent safety zone in Bahía de Ponce, Ponce, PR where New Fortress Energy would be conducting ship-to-ship LNG transfer operations. The proposed rule would consist of a 100-yard safety zone in a location approximately three nautical miles south of Ponce, PR, while LNG transfer operations are being conducted. No vessel or person would be permitted to enter the safety zone when activated without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

## IV. Regulatory Analyses

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

### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a “significant regulatory action,” under Executive

Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration and restrictions of the safety zone. The safety zone required for these operations is 100 yards, making the safety zone limited in size. The safety zone is limited to a location approximately three nautical miles south of Ponce, PR, making the zone limited in location. Additionally, the safety zone will be enforced only while LNG transfer operations are being conducted, making it limited in duration. Vessels will be permitted to enter the safety zone when ship-to-ship transfer operations are not being conducted, limiting the restrictions associated with the safety zone.

### B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

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

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast

Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

### C. Collection of Information

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

### D. Federalism and Indian Tribal Governments

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

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

### E. Unfunded Mandates Reform Act

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

### F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy

Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone during ship-to-ship LNG transfer operations lasting approximately 24 hours that would prohibit entry within 100 yards of the proposed location of the transfer operations. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

#### G. Protest Activities

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

#### V. Public Participation and Request for Comments

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

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

We accept anonymous comments. All comments received will be posted without change to <https://www.regulations.gov> and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking

System of Records notice (85 FR 14226, March 11, 2020).

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

#### List of Subjects in 33 CFR Part 165

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

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

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 165.788 to read as follows:

#### § 165.788 Safety Zone; Bahia de San Juan, Ponce, Puerto Rico.

(a) *Regulated area.* A safety zone is established in the following area: The waters around liquefied gas carriers conducting ship-to-ship liquefied natural gas transfer operations in an area 100-yards around each vessel in the approximate position 17°54'20" N, 066°35'6" W. All coordinates are North American Datum 1983.

(b) *Regulations.* (1) No person or vessel may enter, transit or remain in the safety zone unless authorized by the Captain of the Port, San Juan, Puerto Rico, or a designated Coast Guard commissioned, warrant, or petty officer. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the designated Coast Guard commissioned, warrant, or petty officer.

(2) Vessels encountering emergencies, which require transit through the safety zone, should contact the Coast Guard patrol craft or Duty Officer on VHF Channel 16. In the event of an emergency, the Coast Guard patrol craft may authorize a vessel to transit through the safety zone with a Coast Guard designated escort.

(3) The Captain of the Port and the Duty Officer at Sector San Juan, Puerto Rico, can be contacted at telephone number 787–289–2041. The Coast Guard Patrol Commander enforcing the

safety zone can be contacted on VHF–FM channels 16 and 22A.

(4) Coast Guard Sector San Juan will, when necessary and practicable, notify the maritime community of periods during which the safety zones will be in effect by providing advance notice of scheduled ship-to-ship liquefied natural gas transfer operations of liquefied gas carriers via a Marine Broadcast Notice to Mariners.

(5) All persons and vessels must comply with the instructions of on-scene patrol personnel. On-scene patrol personnel include commissioned, warrant, or petty officers of the U.S. Coast Guard. Coast Guard Auxiliary and local or state officials may be present to inform vessel operators of the requirements of this section, and other applicable laws.

Dated: November 3, 2020.

G.H. Magee,

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

[FR Doc. 2020–24821 Filed 11–30–20; 8:45 am]

BILLING CODE 9110–04–P

#### NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

#### 36 CFR Parts 1224, 1225, and 1236

[FDMS No. NARA–20–0006; NARA–2021–001]

RIN 3095–AB99

#### Federal Records Management: Digitizing Permanent Records and Reviewing Records Schedules

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend our electronic records management regulations to add a subpart containing standards for digitizing permanent Federal records so that agencies may dispose of the original source records, where appropriate and in accordance with the Federal Records Act amendments of 2014. We are also making a minor revision to our records schedule review provisions to establish a requirement for agencies to review, every five years, all records schedules that are ten years old and older, based on the date the National Archives and Records Administration (NARA) approved the schedule.

**DATES:** Submit comments on or before February 1, 2021.

**ADDRESSES:** You may submit comments, identified by RIN 3095–AB99, by either of the following methods:

• *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the site's instructions for submitting comments.

• *Mail* (for paper, flash drive, or CD-ROM submissions. Include RIN 3095–AB99 on the submission): We normally accept mail submissions, but due to the current COVID–19 pandemic, we do not have usual staff presence at the building and mail is likely to be delayed significantly past the comment period. If you wish to submit comments by cannot do so through the eRulemaking portal, please contact us at the number below so we can work with you to make alternate arrangements.

*Instructions*: All submissions must include NARA's name and the regulatory information number for this rulemaking (RIN 3095–AB99). We may publish any comments we receive without changes, including any personal information you include.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Keravuori, by email at [regulation\\_comments@nara.gov](mailto:regulation_comments@nara.gov), or by telephone at 301.837.3151. Contact [rmstandards@nara.gov](mailto:rmstandards@nara.gov) with any questions on records management and digitization.

#### SUPPLEMENTARY INFORMATION:

##### Background

We propose to amend 36 CFR part 1224, Records Disposition Programs, and 36 CFR part 1225, Scheduling Records, to set a timeframe for required review of existing records schedules. The current regulations state that schedules should be reviewed “regularly.” This rulemaking clarifies the word “regularly” by establishing a timeframe for those recurring reviews. This is based upon investigation that determined that many schedules have not been being kept up to date or revised when needed. We propose revising the regulations to require that every five years agencies must review records schedules that are ten years old or older, based on the date NARA approved the schedule.

In addition, we propose to amend 36 CFR part 1236, Electronic Records Management, to add a new subpart establishing standards for digitizing permanent paper and photographic records, including paper and photographs contained in mixed-media records. In 2014, the Federal Records Act at 44 U.S.C. 3302 was amended by Public Law 113–187 to require NARA to issue standards for reproducing records digitally ‘with a view to the disposal of the original records.’ The amendment applies to both temporary and permanent records.

This rulemaking covers only permanent records of the kinds listed above. We previously amended 36 CFR part 1236 to add standards for digitizing temporary records, which constitute the majority of Federal records (RIN 3095–AB98, 84 FR 14265 (April 10, 2019), effective May 10, 2019). We plan to issue additional digitizing requirements for other specific media types in future revisions to the rule. In the interim, agencies should contact [rmstandards@nara.gov](mailto:rmstandards@nara.gov) about digitizing other types of permanent records.

Permanent records are approved by the Archivist of the United States as having sufficient historical or other value that warrants continuing to preserve them beyond the time agencies need the records for administrative, legal, or fiscal purposes. Agencies retain permanent records for administrative, legal, or fiscal purposes for a specific period of time. At the end of the scheduled retention period, they then transfer permanent records to the legal custody of the National Archives.

These digitizing standards for permanent records ensure that agencies can continue to use digital versions for the same business purposes as the original records, and that the digital records will be appropriate for preserving in NARA's archival holdings. We intend the regulation to be neutral about who performs the digitizing activities for the agency, whether a parent agency, a component agency, a vendor or other similar entity acting on the agency's behalf.

This proposed rulemaking defines the requirements for digitizing as a records management activity, drawing from principles within the Federal Agencies Digital Guidelines Initiatives (FADGI), Technical Guidelines for Digitizing Cultural Heritage Materials Creation of Raster Image Files (2016), and from International Organization for Standardization (ISO) Technical Specifications (TS) and Technical Reports (TR); specifically ISO/TR 13028:2010, Information and documentation—Implementation guidelines for digitizing records. It also provides agencies with guidance necessary to proceed with projects for digitizing and disposing of original source permanent records. These technical digitizing standards apply to both unclassified and classified national security records. However, this rulemaking does not address other standards specific to classified information, such as classified-specific metadata or acquiring secure equipment. These subjects do not fall

under our records management authority and are outside the scope of this regulation.

The standards in this proposed rulemaking apply retroactively to digitized permanent records that have not been transferred to the National Archives. If agencies determine their previously digitized records are not in compliance with these standards, re-digitizing may be necessary. Re-digitizing the records will allow agencies to use the GRS as the authority to destroy the original paper source records and transfer the new digitized records to NARA. However, if agencies' previously digitized records can't meet the requirements in this proposed regulation, they also have other options: (1) Send the paper versions of the permanent records for storage to NARA's Federal records centers by December 31, 2022; (2) work with us to develop an agency-specific records schedule that addresses the previously digitized records, providing authority to transfer the electronic records to NARA and destroy the original source records (this option is available if NARA determines the previously digitized records are acceptable permanent records, even if the scanned versions were digitized to standards that differ from the ones in this regulation); or (3) request an exception as part of the agency's strategic response to meeting the OMB/NARA Memorandum M–19–21 goals (see NARA Bulletin 2020–01, Guidance on OMB/NARA Memorandum Transition to Electronic Records (M–19–21) at <https://www.archives.gov/records-mgmt/bulletins/2020/2020-01> for details on agency strategic response requirements and exceptions). Some agencies might find a combination of these options will be needed to address any issues with previously scanned paper records.

While this rulemaking is proposed and under development, we recommend that agencies discuss digitization projects with their general counsel and agency records officer before disposing of original permanent records. Agencies should also continue to follow the process in the General Records Schedule, 36 CFR 1225.24, and NARA Bulletin 2010–04, Guidance Concerning Notifications for Previously Scheduled Permanent Records (<https://www.archives.gov/records-mgmt/bulletins/2010/2010-04.html>).



## Regulatory Analysis

*Review Under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), and Executive Order 13563, Improving Regulation and Regulation Review, 76 FR 23821 (January 18, 2011)*

The Office of Management and Budget (OMB) has reviewed this rulemaking and determined it is not “significant” under section 3(f) of Executive Order 12866. It is not significant because it applies only to Federal agencies, updates the regulations due to a statutory requirement, to incorporate technological developments, and to account for increased rapidity in changing technology and agency practices, and is not establishing a new program. Although the proposed revisions change and add new requirements for agencies, the requirements are necessary to keep the existing regulations up-to-date, comply with the statute, and ensure agencies are preserving records for the United States.

*Review Under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.)*

This review requires an agency to prepare an initial regulatory flexibility analysis and publish it when the agency publishes the proposed rule. This requirement does not apply if the agency certifies that the rulemaking will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). We certify, after review and analysis, that this rulemaking will not have a significant adverse economic impact on small entities.

*Review Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rulemaking does not impose additional information collection requirements subject to the Paperwork Reduction Act on the public.

*Review Under Executive Order 13132, Federalism, 64 FR 43,255 (August 4, 1999)*

Review under Executive Order 13132 requires that agencies review regulations for Federalism effects on the institutional interest of states and local governments, and, if the effects are sufficiently substantial, prepare a Federal assessment to assist senior policy makers. This rulemaking will not have any effects on state and local governments within the meaning of the Executive Order. Therefore, no Federalism assessment is required.

*Review Under Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (February 3, 2017)*

Review under E.O. 13771 seeks to reduce Federal regulations that impose private expenditures in order to comply with them, and to control those costs in any such regulations. OMB has reviewed this rulemaking and determined that it is exempt from E.O. 13771 requirements. This rulemaking is exempt because it applies only to Federal agencies, involves agency organization, management, or personnel, modifies an existing rule, and does not involve regulatory costs subject to the Executive Order.

*Review Under the Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4; 2 U.S.C. 1532)*

Review under the Unfunded Mandates Reform Act requires that agencies determine whether any Federal mandate in the rulemaking may result in state, local, and tribal governments, in the aggregate, or the private sector, expending \$100 million in any one year. NARA certifies that this rulemaking does not contain a Federal mandate that may result in such an expenditure, and this rulemaking is therefore not subject to this requirement.

## List of Subjects

36 CFR Parts 1224 and 1225

Archives and records, Recordkeeping, Records disposition, Records management, Records schedules, Scheduling records.

36 CFR Part 1236

Archives and records, Digitization, Digitized records, Digitizing, Electronic mail, Electronic records, Metadata, Permanent records, Recordkeeping, Records management, Quality assurance, Quality control, Quality management, Temporary records.

For the reasons discussed in the preamble, NARA proposes to amend 36 CFR parts 1224, 1225, and 1236 as follows:

## PART 1224—RECORDS DISPOSITION PROGRAMS

■ 1. The authority citation for part 1224 continues to read as follows:

**Authority:** 44 U.S.C. 2111, 2904, 3102, and 3301.

■ 2. In § 1224.10, in paragraph (c), add two sentences at the end to read as follows:

## § 1224.10 What must agencies do to implement an effective records disposition program?

\* \* \* \* \*

(c) \* \* \* Every five years, agencies must review all records schedules that are ten years old and older, based on the date NARA approved the schedule. See § 1225.22 of this subchapter.

\* \* \* \* \*

## PART 1225—SCHEDULING RECORDS

■ 3. The authority citation for part 1225 continues to read as follows:

**Authority:** 44 U.S.C. 2111, 2904, 2905, 3102, and Chapter 33.

■ 4. Amend § 1225.22 by:

■ a. Revising the section heading and the introductory text; and

■ b. In paragraph (a), by removing the words “an SF 115” and adding in their place the words “a new records schedule”.

The revisions read as follows:

## § 1225.22 When must agencies reschedule or review their records schedules?

Agencies should review their records schedules on a regular basis to determine if they remain accurate. Every five years, agencies must review all records schedules that are ten years old and older, based on the date NARA approved the schedule. Agencies must submit a new records schedule to NARA in the following situations:

\* \* \* \* \*

## PART 1236—ELECTRONIC RECORDS MANAGEMENT

■ 5. The authority citation for part 1236 continues to read as follows:

**Authority:** 44 U.S.C. 2904, 3101, 3102, 3105, 3301, 3302, and 3312.

■ 6. In § 1236.2, revise the section heading, and in paragraph (b) add definitions in alphabetical order for “Administrative metadata”, “Checksum”, “Descriptive metadata”, “Embedded metadata”, “Intellectual control”, “Media”, “Mixed-media files”, “Physical control”, “Quality assurance (QA)”, “Quality control (QC)”, “Quality management (QM)”, and “Technical metadata” to read as follows:

## § 1236.2 Definitions that apply to this part.

\* \* \* \* \*

(b) \* \* \*

*Administrative metadata* are elements of information used to manage records and relate them to one another. Administrative metadata elements describe how a record was created, any access and use restrictions that apply to it, information about the record series to which it belongs, and the disposition

schedule that identifies its retention period.

*Checksum* is a function that takes an input string, which can be of any length, and generates an output of fixed length. The output, or hash, is used to authenticate information, such as whether a file has been corrupted or modified. The values returned by a hash function are called hash values, hash codes, digests, or simply hashes.

*Descriptive metadata* are elements of information that describe the records or set of records itself. They apply to both the original source records and any versions produced through digitization. Descriptive metadata elements for individual source records include such elements as the title of a record, a description of its contents, its creator, and the date it was created. These elements support searching for and discovering records.

\* \* \* \* \*

*Embedded metadata* are textual components that exist alongside the content (usually binary data) within the file. Embedded metadata may be used to make self-describing digital files that contain specified administrative, rights, and technical metadata and can be appropriately managed outside of a recordkeeping system.

*Intellectual control* is having the information necessary to identify and understand the content and context of the records. This includes knowing the disposition schedule under which the records fall, the date range when the records were created, and any access or use restrictions that apply to the records.

*Media* are the physical forms on which records are stored, such as paper, photographs, compact discs, DVDs, analog tapes, flash drives, local hard drives, or servers.

\* \* \* \* \*

*Mixed-media files* include records in different forms of media. A file, when used in the phrase “mixed-media file,” is a group of records—regardless of location and type of media—that belong together or relate to a topic, such as a case file. For example, a mixed-media case file could be a box with paper notes, audio recordings of interviews, and a CD of photographs, along with physical evidence stored separately in an evidence locker. Records in a file may be in more than one media type due to changes in how agencies create, maintain, and use records, shifts in technology, and the topic or activity involved.

*Physical control* is having the information necessary to physically manage the records. This includes

knowing where the records are housed, whether any records that fall within the project’s scope are missing or stored separately, and the records’ physical form (such as media types, the records’ dimensions, and the smallest level of detail used to convey information).

*Quality assurance (QA)* are the proactive quality management (QM) activities focused on preventing defects by ensuring that a particular product or service achieves certain requirements or specifications. A QA program is heavily dependent on quality control (QC) data to search for patterns and trends. QA activities also include controlled experiments, design reviews, and system tests. QA programs can improve quality through creating plans and policies or creating and conducting training.

*Quality control (QC)* are activities that examine products through inspection or testing to determine if they meet their specifications. The purpose is to detect defects (deviations from predetermined requirements) in products or processes.

*Quality management (QM)* are the overall management functions and underlying activities that determine quality policies, objectives, and responsibilities, and implement them through planning, control, assurance, and improvement methods within the quality system.

*Technical metadata* are elements of information that describe processes used to create electronic files, and parameters that aid a system in rendering the files properly. Technical metadata may include elements such as a file’s byte size, file format and version, color encoding, and the type of equipment used to make the file (camera name, scanner manufacturer, etc.).

\* \* \* \* \*

#### ■ 7. Add subpart E to read as follows:

##### **Subpart E—Digitizing Permanent Federal Records**

###### **Sec.**

- 1236.40 Scope of this subpart.
- 1236.41 Definitions for this subpart.
- 1236.42 General requirements.
- 1236.44 Preparing records for digitization.
- 1236.46 Project management and documentation requirements.
- 1236.48 File format requirements.
- 1236.50 Digitization requirements for permanent paper and photographic print records.
- 1236.52 Digitization requirements for permanent mixed-media files.
- 1236.54 Metadata requirements.
- 1236.56 Quality control (QC) inspection requirements.
- 1236.58 Validating digitized records and disposition instructions.

##### **Subpart E—Digitizing Permanent Federal Records**

###### **§ 1236.40 Scope of this subpart.**

(a) This subpart covers the standards and procedures you (an agency, employee, or agents acting on the agency’s behalf, such as contractors) must apply when digitizing permanent paper records using reflective digitization techniques. Such records include most paper-based documents regardless of size, such as modern office paper, maps, posters, manuscripts, graphic-arts prints (lithographs, intaglio, etc.), drawings, bound volumes, and photographic prints. This subpart also covers any records that may be incorporated into mixed-media records.

(b) This subpart does not cover standards and procedures you must apply when digitizing permanent records using transmissive digitization techniques. Such records include photographic negatives, transparencies, aerial film, roll film, and micrographic and radiographic materials. In addition, this subpart does not cover records on dynamic media, such as motion picture and audio-visual records, videotapes, and audio cassette tapes.

(c) For guidance on digitizing out-of-scope media types or non-paper-based portions of mixed-media records, such as dynamic media, x-rays, negative or positive film, or other special media types, please contact the Records Management Policy and Standards Team by email at [rmstandards@nara.gov](mailto:rmstandards@nara.gov) or by phone at 301.837.1948.

(d) This subpart also does not cover standards and procedures for optical character recognition (OCR) technology. You may perform OCR during digitization to meet agency business needs and transfer the resulting files to NARA, but this subpart does not require OCR.

(e) This subpart does not address other applicable laws and regulations governing documents and electronic files, including, but not limited to, proper handling of classified or controlled unclassified information and compliance with 36 CFR part 1194 (which establishes requirements for compliance with section 508 of the Rehabilitation Act). You should work with your legal counsel and other officials to ensure compliance with these and other applicable requirements.

(f) This subpart also does not address other business needs or legal constraints that may make it necessary for an agency to retain original source records for a period of time after digitizing. You should work with your agency legal counsel to determine whether such

retention might be necessary because it relates to rights and interests, appeal rights, benefits, national security, litigation holds, or other similar reasons.

#### **§ 1236.41 Definitions for this subpart.**

In addition to the definitions contained in § 1236.2 and 36 CFR part 1220, the following definitions apply to this subpart:

*Batch* is a group of files that are created under the same conditions or are related intellectually or physically. During digitization, batches represent groups of records that are digitized and undergo QC inspection processes together.

*Color encoding accuracy* is measured in DICE by computing the color difference ( $\Delta E_{2000}$ ) between the digital imaging results of the standard target patches and their pre-measured color values. By imaging the DICE target and evaluating through the DICE software, variances from known values can be determined, which is a good indicator of how accurately the system is recording color. DICE measures the average deviation of all color patches measured (the mean).

*Color channel misregistration* measures the spread of red, green, and blue light in terms of pixel misregistration. This parameter is used to evaluate lens performance. The vernacular term for this is called color fringing.

*Color management* is using software, hardware, and procedures to measure and control color in an imaging system, including capture and display devices.

*Digital Image Conformance Evaluation (DICE)* is the measurement and monitoring component of the Federal Agencies Digital Guidelines Initiative (FADGI) Conformance Program. DICE consists of ISO-compliant reference targets and analysis software for testing and monitoring digitization programs to ensure they meet FADGI technical parameters. You can access DICE online at <http://www.digitizationguidelines.gov/guidelines/digitize-OpenDice.html>.

*Digitization project* is any action an agency (including an agent acting on the agency's behalf, such as a contractor) takes to digitize permanent records. For example, a digitization project can range from a one-time digitization effort to a multi-year digitization process; can involve digitizing a single document into an electronic records management system or digitizing boxes of records from storage facilities; or can include digitizing active records as part of an ongoing business process or digitizing inactive records for better access.

*Digitized record* is an electronic record created by converting paper or other media formats to a digital form that is of sufficient authenticity, reliability, usability, and integrity to serve in place of the original source record.

*Dynamic range* is the ratio between the smallest and largest possible values of a changeable quantity, frequently encountered in imaging or recorded sound. Dynamic range is another way of stating the maximum signal-to-noise ratio.

*Federal Agencies Digital Guidelines Initiative (FADGI)* is a collaborative effort by Federal agencies to articulate Technical Guidelines that form the basis for many of the digitization technical parameters in this Part, which equate to the FADGI three-star level. You can access FADGI online at <http://www.digitizationguidelines.gov/guidelines/digitize-technical.html>.

*Image quality* measures a digital image's overall accuracy in faithfully reproducing an original. A digital image created to a high degree of accuracy meets or exceeds objective performance attributes (such as level of detail, tonal and color fidelity, and correct exposure), and has minimal defects (such as noise, compression artifacts, or distortion).

*Lightness non-uniformity* measures how evenly a lens records the lighting of neutral reference targets from center to edge and between points within the image.

*Mass digitization* is the large-scale scanning of source records using scanners capable of high-volume throughput. Mass digitization approaches are appropriate for paper records of uniform size and type that can be digitized without being damaged by the equipment, and in which there is no information requiring higher specifications to ensure accurate capture (such as fine detail or precise color accuracy).

*Modulation transfer function (MTF)/spatial frequency response (SFR)*. MTF is the modulation ratio between the output image and the ideal image. SFR measures the imaging system's ability to maintain contrast between increasingly smaller image details. Using these two functions, a system can make an accurate determination of resolution related to sampling frequency.

*Noise* is an undesirable image artifact(s) in a digitized record that is not part of the original source material.

*Raster image* is a digitally encoded representation of a subject's tonal and brightness information into a bitmap. Data from digital cameras and scanning devices record light characteristics as

numerical values into a grid, or raster, of picture elements (pixels). Raster data differs from vector data, in which geometrical points, lines, curves, and shapes are based upon mathematical equations, thus creating an image without specific data-to-pixel mapping.

*Reference target* is a chart of test patterns with known values used to evaluate the performance of an imaging system.

*Reflective digitization* is a process in which an imaging system captures reflected light off of scanned objects such as bound volumes, loose pages, cartographic materials, illustrations, posters, photographic prints, or newsprint.

*Reproduction scale accuracy* measures the relationship between the physical size of the original object and the size in pixels per inch (ppi) of that object in the digital image.

*Resolution* is the level of spatial detail an imaging system can resolve in an image.

*Sampling frequency* measures the imaging spatial resolution and is computed as the physical pixel count or pixels per unit of measurement, such as pixels per inch (ppi). This parameter provides information about the size of the original and the data needed to determine the level of detail recorded in the file. (See also modulation transfer function (MTF)/spatial frequency response (SFR) above.)

*Sharpening* artificially enhances details to create the illusion of greater definition. Image quality testing using the SFR quantifies the level of sharpening introduced by imaging systems or applied by users in post-processing actions.

*Source record or original source record* is the record from which a digitized version or digitized record is created.

*Spatial resolution* determines the amount (quantity, ppi, megapixels, etc.) of data in a raster image file in terms of the number of picture elements or pixels per unit of measurement, but it does not define or guarantee the quality of the information. Spatial resolution defines how finely or widely spaced the individual pixels are from each other. The actual rendition of fine detail is more dependent on the spatial frequency response (SFR) of the scanner or digital camera.

*Tone response or opto-electronic conversion function (OECF)* is a measure of how accurately the digital imaging system converts light levels into digital pixels.

*Transmissive digitization* is a process in which the system transmits light

through a photographic slide or negative.

*White balance error* measures the digital file's color neutrality. When the balance is neutral, a white patch in the reference target should be recorded as even values across red, green, and blue channels, with a value approaching the limit of the file format to define white.

#### **§ 1236.42 General requirements.**

(a) *Purpose and objectives.* This subpart establishes processes and requirements to ensure that agencies:

- (1) Identify the scope of each digitization project;
- (2) Account for all records included in the scope of the digitization project regardless of their media type;
- (3) Produce complete and accurate digitized records that can be used for all the same purposes as the originals; and
- (4) Validate that the resulting digitized records meet the standards required in § 1236.58 for replacing permanent Federal records.

(b) *Records management requirements.* You must comply with existing records management requirements identified in 36 CFR part 1222 and other subparts of this part. You must also place digitized records in a system that can successfully produce and manage the records over time and must ensure you have intellectual and physical control over source records sufficient to support digitization. Having and maintaining an appropriate level of intellectual and physical control over source records is critical to a digitization project's success, regardless of whether the agency, or an agent acting on the agency's behalf (such as a contractor), performs the digitization activities.

(1) You must establish and document all the elements of intellectual control. *See* definition at § 1236.2.

(2) You must also establish and document all the elements of physical control. *See* definition at § 1236.2. For more information on documenting the smallest level of detail, *see* § 1236.50(c)(2).

(i) Understanding the physical properties of source records is necessary to properly identify a project's scope and acquire appropriate equipment.

(ii) Non-standard media, such as post-it notes, envelopes, or onion-skin paper, may require special handling and equipment. Using improper equipment may result in damage to original records.

(iii) You must also document any records that you cannot digitize according to the standards in this subpart.

(iv) For more information about selecting equipment and about records

that need special handling, please contact the Records Management Policy and Standards Team by email at [rmstandards@nara.gov](mailto:rmstandards@nara.gov) or by phone at 301.837.1948.

(3) Before starting a digitization project, you must have intellectual and physical control over the original records that will be included in the project. In addition, you must create an inventory of records you will digitize, ensure that the proposed series are complete, document any missing records or gaps in coverage as described in § 1236.46, document any restrictions relating to the source records that will also apply to digitized records, and note them as metadata as required in § 1236.54. You will need to maintain intellectual and physical control over the records throughout the project.

(4) You must also document the contents of any electronic or analog storage media, such as CDs, DVDs, or magnetic tapes, you discover when preparing records for digitization.

(i) Determine whether any files on the storage media are records. If the files are non-records, you may dispose of them.

(ii) If the files are records and are part of the same records series you are digitizing, handle them as described in § 1236.52.

(iii) If the files are records but not part of the record series you are digitizing, locate their disposition schedule and migrate them to an electronic information system that complies with the requirements in §§ 1236.10 through 1236.14.

(c) *Quality management (QM) requirements.* To be successful at digitizing permanent records, you need to minimize errors throughout the project, beginning as early in the digitization process as possible. You must therefore develop a quality management (QM) plan that ensures the project meets the quality assurance (QA) objectives and quality control (QC) inspections procedures in §§ 1236.42 through 1236.56. This includes defining requirements, implementing a testing and analysis process, performing corrective measures, and verifying that products conform to the requirements. The plan must document QC procedures and image and metadata quality inspection processes necessary to identify and correct deviations throughout all phases of the project.

(d) *Image quality requirements and QA.* The project must meet the image quality performance parameters, such as resolution, tone, and color accuracy, defined in § 1236.2 and specified in § 1236.50.

(1) To determine whether equipment meets the image quality requirements,

you must scan a reference target with the device and measure the results with analytical software to determine how well the digital imaging equipment's optical resolution, sensor size, and signal processing perform against the performance evaluation technical parameters in § 1236.50(c). Results that fall within the performance metric value's tolerance range confirm the equipment meets the requirements. Equipment specifications, such as scanner ppi settings or camera sensor megapixels, are theoretical resolution claims and do not ensure digital image quality.

(2) To ensure image quality of digital files you create during the project, you must also monitor the digitization workflow by digitizing reference targets and analyzing the results against the technical parameters in § 1236.50(c). When all the measurements fall within the technical parameters' performance metric value tolerance range, the digital files meet the image quality objectives. This image QC process is a major component of your project's QA program.

(3) Your agency must use image QA processes to:

- (i) Determine whether equipment performance meets specifications before you select the equipment;
- (ii) Evaluate internal or external vendor imaging systems against image specifications;
- (iii) Monitor device performance during digitization; and
- (iv) Verify that resulting digital files meet project specifications.

(e) *Image QC standards.* You must have an image quality testing and analysis process that ensures the resulting digitized records conform to the requirements in § 1236.50. You should adopt methods consistent with the Federal Agencies Digital Guidelines Initiative (FADGI) Digital Image Conformance Evaluation (DICE) program (*see* § 1236.41 for a description of DICE) to ensure you meet digitization image quality parameters, but you do not have to use DICE to do so. Any method that ensures you meet the image quality parameters in § 1236.50 is acceptable.

(1) The DICE program, or other automated QC tools you select, should work in concert with manual inspection practices.

(2) If you do not adopt DICE, you must document the image quality measurement and monitoring procedures and reference targets you use instead, and how you verify quality conformance.

(3) FADGI also describes many recommended best practices which you

may use to supplement, but not supersede, applicable regulations and NARA implementing guidance.

(f) *Image quality parameters.* Section 1236.50 outlines the set of performance parameters you must use. These parameters equate to FADGI three-star aimpoints and tolerance ranges. The FADGI Guidelines incorporate image quality specifications, testing methodology, and analyses that are compliant with ISO/TS 19264–1:2017 (Photography—Archiving systems—Image quality analysis—Part 1: Reflective originals) for digitizing cultural heritage materials. We are not incorporating the FADGI Guidelines in their entirety because they include general digitization practices outside the scope of this subpart. However, you may find it helpful when implementing this subpart to consider FADGI discussions, analyses, and papers related to the technical digitization parameters, especially if you are digitizing special or sensitive materials.

(g) *Inspection of digitized files.* You must inspect the resulting digitized files to check that they meet the digital file, image quality, and metadata specifications. Sections 1236.48 through 1236.56 describe digital file quality criteria your agency must inspect through a combination of automated and manual methods outlined in § 1236.56 to verify compliance with these digital imaging specifications.

#### **§ 1236.44 Preparing records for digitization.**

(a) A successful digitization project relies on maintaining source records in their original order throughout the process, capturing all the information and characteristics of the source material, and performing visual and automated QC inspections at multiple stages during a project to ensure the resulting digital record is complete.

(b) Image quality and QC, described in § 1236.42, are only two of the components of digitizing as a records management activity. In addition, you must:

(1) Account for all records included in the project's scope prior to digitization. You should note any missing records or records being retained in their original form in the details section of the Electronic Records Archives (ERA) Transfer Request (TR) instrument and include scans of any charge-out documentation so that skipped or missing records can be inter-filed if they are transferred at a later date;

(2) Survey source records for items that require special handling and select equipment that safely digitizes the

originals without damaging them during the scanning process;

(3) Capture all information in records or files, regardless of the original media type;

(4) Accurately capture administrative, descriptive, and technical metadata specified in § 1236.54, including access and use restrictions metadata;

(5) Determine and apply an appropriate method for associating digitized records with each other, when relevant (such as when digitizing each page of a paper document separately, or each document in a paper file folder separately). Acceptable methods include associating individual image files in a folder structure matching the original paper folder structure or utilizing file formats with support for multi-page files such as PDF or TIFF; and

(6) Ensure that each individual file is usable and that you will be able to locate, retrieve, present, and interpret it over time.

(c) You must also take steps to maintain intellectual and physical control of source records pursuant to 36 CFR 1222.34. In this regard, for each record series or file unit you plan to digitize, you must:

(1) Document the age, media types, dimensions, required level of detail, and condition of source records prior to digitization; and

(2) Institute procedures and controls that:

(i) Ensure you can locate, access, and digitize source records with appropriate safeguards against loss and damage;

(ii) Restrict and log access to records while they are being digitized to minimize the risk of unauthorized additions, deletions, or alterations; and

(iii) Ensure that staff appropriately digitize all records or, if you keep some records in their original format, maintain the association between the digitized and original records using the relationship metadata elements in § 1236.54(c). You should note any records that you do not digitize in the details section of the Electronic Records Archives (ERA) Transfer Request (TR) and include scans of any charge-out documentation so that skipped or missing records can be inter-filed if they are transferred at a later date.

#### **§ 1236.46 Project management and documentation requirements.**

(a) You must ensure that any projects to digitize records meet the parameters in this subpart, and the records are complete, unaltered, and meet all QA criteria.

(b) Accordingly, you must have the following documents when digitizing

permanent records and retain them in association with the digitized records, as specified in § 1236.58(f):

(1) A defined project plan that identifies the:

(i) Record series or file units you will digitize (note any missing records in the details section of the ERA TR and provide scans, as outlined in § 1236.44(b)(1));

(ii) Estimated volume and media types of the original source records;

(iii) Image quality parameters you must meet to capture the appropriate level of detail present in the original in order to interpret the information in the records—including resolution,<sup>1</sup> color, and tonal fidelity. See § 1236.50(c) for the minimum requirements for image quality parameters. The color mode must be either color or grayscale; we do not accept bi-tonal mode for permanent records. You must digitize in color when the original source documents have color present;

(iv) Estimated date range of the source records; and

(v) Estimated storage requirements for the records once digitized (which may affect project decisions, such as compression and file format);

(2) Applicable NARA-approved records schedule(s);

(3) Any related finding aids, indexes, inventories, logs, registers, or metadata the agency uses to manage the records;

(4) QM plans describing QA objectives that achieve the requirements in §§ 1236.48 through 1236.54;

(5) QC procedures to identify and correct errors during digitization in accordance with the requirements in § 1236.56;

(6) QC reports identifying detected errors and remediation steps in accordance with the requirements in § 1236.56.

#### **§ 1236.48 File format requirements.**

(a) You must digitize, encode, retain, and transfer most paper-based documents in one of the following file formats, either uncompressed or using one of the specified lossless compression codecs:

<sup>1</sup> Higher spatial resolution provides more pixels, and generally will render finer detail of the original in the digital image, but not always. The actual rendition of fine detail is more dependent on the spatial frequency response (SFR) of the scanner or digital camera, the image processing applied, and the characteristics of the item being scanned. Adjusting resolution settings to capture the appropriate level of detail in the original source records provides appropriate resolution.

TABLE 1 TO PARAGRAPH (a)

| Format name and version                   | Acceptable lossless compression codecs                             |
|-------------------------------------------|--------------------------------------------------------------------|
| TIFF 6.0 .....                            | Uncompressed, LZW compression.                                     |
| JPEG2000 part 1 .....                     | JPEG 2000 part 1 core coding system lossless compression.          |
| Portable network graphics 1.2 (PNG) ..... | DEFLATE (ZIP).                                                     |
| PDF/A-1 .....                             | DEFLATE (ZIP).                                                     |
| PDF/A-2 .....                             | DEFLATE, JPEG 2000 part 1 core coding system lossless compression. |

(b) You must digitize, encode, retain, and transfer photographic print records in one of the following file formats,

either uncompressed or with one of the specified lossless compression codecs:

TABLE 2 TO PARAGRAPH (b)

| Format name and version                   | Acceptable compression codecs                             |
|-------------------------------------------|-----------------------------------------------------------|
| TIFF 6.0 .....                            | Uncompressed, LZW.                                        |
| JPEG2000 part 1 .....                     | JPEG 2000 part 1 core coding system lossless compression. |
| Portable network graphics 1.2 (PNG) ..... | DEFLATE.                                                  |

(c) You must transfer metadata specified in § 1236.54 table 1 to paragraph (c)(1), table 2 to paragraph (c)(2), and table 3 to paragraph (d) in comma separated values (CSV) format.

**§ 1236.50 Digitization requirements for permanent paper and photographic print records.**

(a) *Equipment requirements.* The equipment you use to digitize Federal records must be appropriate for the media type, capable of achieving documented project objectives, and meet the parameters specified in paragraph (c) of this section for paper records in good physical condition that are suitable for mass digitization or paragraph (d) of this section for photographic print records and paper records that require higher resolution or color accuracy or that can't physically be digitized by mass digitization.

(1) The specifications in paragraph (c) of this section are applicable for paper records that are suitable for mass digitization using high-volume scanners. To be suitable for this set of standards, the records must be in good physical condition, with well-defined printed type (such as typeset, typed, laser-printed, etc.), and have moderate to high contrast between the ink of the text and the paper background.

(2) The specifications in paragraph (d) of this section are applicable for photographic prints and paper records that are old, brittle, or folded, or that could be damaged by high-speed equipment. For records in poor physical condition, agencies must use equipment that does not result in further damage. For records with poor legibility or diffuse characters (such as carbon copies, Thermofax/Verifax, etc.),

handwritten annotations or other markings, low inherent contrast, staining, fading, halftone illustrations, or photographs, digitization equipment or record staging must be capable of capturing record content, including all text, any embossed seals, or other details that can't be digitized by mass digitization.

(3) For records where the smallest significant detail in a record is 1.0 mm or smaller, such as aerial photographs and topographic maps (which require a high degree of enlargement and precision regarding the dimensional accuracy of the scans when compared to textual documents or other types of photographs), you must use table 2 to paragraph (d) of this section, but you must set the resolution so that the MTF and SFR performance of the scanner exceeds the tolerance ranges in table 2. For many imaging devices, increasing the ppi settings may not increase the actual level of resolution or capture the desired detail. The equipment you select for digitizing records with fine detail must be capable of meeting the higher quality parameters.

(4) For records that can't be captured to the specifications in paragraph (c) or (d) of this section, such as records containing a high degree of fine detail or need for color accuracy, you must contact NARA.

(b) *Implementation requirements.* You must:

(1) Implement an image quality analysis process and use device-level reference targets to verify that digitization devices conform to imaging parameters in this subpart;

(2) Replace reference targets as they fade, or accumulate dirt, scratches, and

other surface marks that reduce their usability;

(3) Regularly test equipment to ensure scanners and digital cameras/copy systems are performing optimally.

(i) You must scan a reference target containing a grayscale, color chart, and accurate dimensional scale at the beginning of each workday; and

(ii) Perform additional tests when you detect problems;

(4) Test equipment with the specific software/device driver combination(s) you use, and re-test after every software update;

(5) Ensure that equipment operation, settings, and image processing actions remain consistent for the entire batch and are applied to all images in the batch;

(6) Encode original image files using a compression type, and in a format, specified in § 1236.48, and with the resolution, color mode, bit depth, and color space specified in table 1 to paragraph (c) of this section;

(7) You must not reformat, use a lossy compression codec, or interpolate (upsample) files to meet the standards in this subpart; and

(c) *Digitizing requirements for mass digitization of paper records in good physical condition.* For these records, produce image files (as described in table 1 to paragraph (c)) at 300 ppi sized to the original document.

(1) Records suitable for the specifications in table 1 are paper records with well-defined printed type (such as typeset, typed, laser-printed, etc.), and with moderate to high contrast between the ink of the text and the paper background.

(i) Performance metric values for the tone response (OECF) (Lightness,  $L^*$ )

conform to the FADGI category for Federal textual records; and

(ii) These values are appropriate when original source records do not have visible content that is recorded in the same tone densities as the two darkest patches (L\*20 and L\*21) of the DICE target.

(2) The specifications in table 1 are not appropriate for records that include

fine detail, require a high degree of color accuracy, or have other unique characteristics that cannot be captured using the specifications in this table, or that cannot safely undergo high-volume digitization because they are fragile, would be damaged, or have other physical conditions that do not lend themselves to high-volume or mass digitization.

(3) You must digitize in an RGB color mode when the original source paper records have color present. You may digitize non-photographic print paper records in grayscale mode if there is no color present.

(4) At a minimum, you must digitize the paper records covered by this paragraph to the following parameters:

TABLE 1 TO PARAGRAPH (c)

| Digital file specifications <sup>1</sup>                                | Attributes                                                                 |
|-------------------------------------------------------------------------|----------------------------------------------------------------------------|
| Color mode <sup>2</sup> .....                                           | RGB color or grayscale. <sup>3</sup>                                       |
| Bit depth .....                                                         | 8- or 16-bit.                                                              |
| Working color space .....                                               | gray gamma 2.2, AdobeRGB1998, sRGB, ProPhoto, ECIRGBv2.                    |
| Sampling Frequency <sup>4</sup> .....                                   | ≥300 ppi.                                                                  |
| Performance evaluation technical parameters                             | Performance metric values                                                  |
|                                                                         | Difference from aim                                                        |
|                                                                         | (applies to $20 \leq L^* \leq 100$ )                                       |
| Tone response (OECF) (Lightness, L*) .....                              | $-5 \leq L^* \leq 5$ .                                                     |
| White balance error (a*b*) (applies only to nominal gray patches) ..... | $-4 \leq a^*b^* \leq 4$ .                                                  |
| Non-uniformity (Lightness, L*) .....                                    | ≤3%.                                                                       |
| Color encoding accuracy (mean ΔE2000) <sup>5</sup> .....                | ≤5.                                                                        |
| Color channel misregistration .....                                     | ≤0.50 pixel.                                                               |
| MTF10 (10% SFR) .....                                                   | sampling efficiency ≥80% and SFR response at half sampling frequency ≤0.3. |
| MTF50 (50% SFR) .....                                                   | 50% of half sampling frequency: [35%,75%].                                 |
| Reproduction scale accuracy .....                                       | <+/- 2% of aim.                                                            |
| Sharpening (maximum SFR) .....                                          | ≤1.1.                                                                      |
| [Noise] ΔL* standard deviation .....                                    | ≤2.                                                                        |

<sup>1</sup> Count values are expressed as 8-bit equivalents.

<sup>2</sup> Must digitize in color when the original source paper records have color present.

<sup>3</sup> We do not accept permanent records digitized in bi-tonal (black and white) mode.

<sup>4</sup> The sampling frequency and the image dimensions determine the total number of pixels in the image, but do not determine the actual level of detail captured by an image system. The Modulation Transfer Function (MTF) is the scientific method to evaluate the spatial resolution performance of an imaging system. The MTF concept is an objective method to determine spatial resolution that is more accurate, compared to subjective methods such as dots-per-inch (dpi) or visual observation bar target readings. Resolution is a measure of how well spatial details are preserved in an imaging system by evaluating a range of measurements and quantifying them in a functional curve MTF plot.

<sup>5</sup> ΔE2000 is the specific formula used to calculate color difference for this metric.

(d) *Digitizing requirements for photographic prints, and paper records not suitable for mass digitization.* For these records, produce image files (as described in table 2 to paragraph (d)) at 400 ppi sized to the original document. You may need to apply higher resolution for some photographic prints to capture fine detail.

(1) The photographic print specifications also apply to manuscripts, illustrations, or graphics, as well as documents with poor legibility or diffuse characters, such as carbon copies, Thermofax, etc.

(2) You must digitize photographic prints (and items outlined in paragraph (d)(1) of this section), including monochrome and black and white

originals, using RGB color mode (which captures nuances in black, gray, sepia, etc., as well as color contained in the original). Paper records may be digitized in grayscale mode if there is no color present; if color is present, you must digitize them using RGB color mode.

(3) At a minimum, you must digitize all the records covered by this paragraph to the following parameters:

TABLE 2 TO PARAGRAPH (d)

| Digital file specifications <sup>1</sup>        | Attributes                                                                 |
|-------------------------------------------------|----------------------------------------------------------------------------|
| Color mode <sup>2</sup> .....                   | RGB color or grayscale. <sup>3</sup>                                       |
| Bit depth .....                                 | 24-bit.                                                                    |
| Color space .....                               | Gray gamma 2.2, AdobeRGB1998, ProPhoto, ECIRGBv2.                          |
| Sampling frequency <sup>4</sup> .....           | ≥ 400 ppi minimum.                                                         |
| Performance evaluation technical parameter      | Performance metric values                                                  |
| Tone response (OECF) (Lightness, L*) .....      | ±5-count levels ≤4.                                                        |
| White balance error (a*b*) .....                | ±4-count levels ≤4.                                                        |
| Non-uniformity (Lightness, L*) .....            | <3%.                                                                       |
| Color accuracy (mean ΔE2000) <sup>5</sup> ..... | <4.                                                                        |
| Color channel misregistration .....             | <0.50 pixel.                                                               |
| MTF10 (10% SFR) .....                           | sampling efficiency >80% and SFR response at half sampling frequency <0.3. |
| MTF50 (50% SFR) .....                           | 50% of half sampling frequency: [35%,75%].                                 |
| Reproduction scale accuracy .....               | <+/- 2% of aim.                                                            |
| Sharpening (maximum SFR) .....                  | <1.1.                                                                      |

TABLE 2 TO PARAGRAPH (d)—Continued

| Digital file specifications <sup>1</sup>      | Attributes       |
|-----------------------------------------------|------------------|
| Noise .....                                   | <4-count levels. |
| [Noise] $\Delta L^*$ standard deviation ..... | <2.              |

<sup>1</sup> Count values are expressed as 8-bit equivalents.

<sup>2</sup> Must digitize photographic prints, manuscripts, etc., in color, even when originals are in black and white or monochrome. Must digitize other paper documents in color when the original source paper records have color present; otherwise, may digitize such paper records in grayscale.

<sup>3</sup> We do not accept permanent records digitized in bi-tonal (black and white) mode.

<sup>4</sup> The sampling frequency and the image dimensions determine the total number of pixels in the image, but do not determine the actual level of detail captured by an image system. The Modulation Transfer Function (MTF) is the scientific method to evaluate the spatial resolution performance of an imaging system. The MTF concept is an objective method to determine spatial resolution that is more accurate, compared to subjective methods such as dots-per-inch (dpi) or visual observation bar target readings. Resolution is a measure of how well spatial details are preserved in an imaging system by evaluating a range of measurements and quantifying them in a functional curve MTF plot.

<sup>5</sup>  $\Delta E_{2000}$  is the specific formula used to calculate color difference for this metric.

#### § 1236.52 Digitization requirements for permanent mixed-media files.

(a) Related records may be managed together but stored on more than one media type. For example, a “case file” may include paper records, on-line electronic records, and electronic records on storage media such as magnetic tapes or other optical media. This reflects the way agencies create, maintain, and use these records; these are mixed-media files.

(b) When digitizing files that fall within the scope of this subpart (see § 1236.40) but are part of a mixed-media file, you must:

(1) Assess any electronic records in the mixed-media file to determine if they are digitized copies of paper records.

(i) If they are not digitized versions of paper records, ensure the electronic records remain associated with the rest of the records in the original mixed-media file.

(ii) If they are digitized versions of paper records, determine whether they meet the digitization standards in this subpart. If so, ensure they remain associated with the rest of the records in the original mixed-media file. If not, re-digitize the original paper records to the standards of this subpart.

(2) Digitize any paper records and photographic prints in the mixed-media file according to standards in § 1236.50(c) and (d);

(c) You should contact the Records Management Policy and Standards Team at [rmstandards@nara.gov](mailto:rmstandards@nara.gov) for guidance on what to do with types of media in a mixed-media file that are outside the scope of this subpart, such as dynamic media, x-rays, negative or positive film, or other special media types.

#### § 1236.54 Metadata requirements.

(a) *General.* Whether embedded into image files or captured in a record-

keeping system, metadata provides information explaining what each record contains, when and why it was created, what media it was recorded on, original dimensions, and whether any restrictions govern its use. Metadata also describes the digitization process and the technical attributes of the resulting electronic records. It is important to capture this information about original source records and about the intervening digitization steps because we will not have the original source records or other project documentation to use when maintaining the digitized versions as archival records in the future.

(1) You should consider business and legal needs when developing the project plan and how your agency will capture the metadata.

(2) Depending on your agency’s existing record-keeping practices and level of intellectual control, you may use information from the record series, file unit, or project level as the source for administrative and descriptive metadata fields. If the components of a record have not been individually indexed with unique descriptions, you may apply the series or file unit level descriptions to all of the image files within that grouping. If the components of the record do not have individual titles, you must apply the item Record IDs instead.

(3) If you provide other metadata elements in addition to the metadata requirements in this subpart, we will accept that metadata as part of the transfer process.

(4) “Mandatory if applicable” instructions in the tables in this section mean that you must provide the metadata if the agency captures the metadata as part of its business processes. You do not have to create “mandatory if applicable” metadata as

an extra step to transfer records to NARA.

(b) *Overall requirements.* You must:

(1) Capture the metadata specified by paragraphs (c), (d), and (e) of this section at the file or item level as part of the digitization project;

(2) When digitization and image processing are complete and when agencies determine that records are no longer in active use and no longer subject to changes that would alter a checksum, you must generate checksums and record them as technical metadata in a record-keeping system for each image file, and use them to monitor electronic records for corruption or alteration;

(3) Create file names and record IDs that are unique to each file (although you must capture other metadata at the file or item level, some might be common to multiple files or items, but not these two elements);

(4) Embed the metadata specified by paragraph (c) of this section in each image file, capture and maintain it in a record-keeping system, associate it with the records it describes, and keep it consistent and accurate in both places;

(5) Ensure that scanning equipment embeds the system-generated technical metadata specified by paragraph (e) of this section in each image file and that image processing does not alter or delete it;

(6) Transfer metadata specified by paragraphs (c) and (d) of this section to NARA in CSV format; and

(7) Retain documentation and information described in 36 CFR 1222.28 and associate it with the digitized records.

(c) *Administrative metadata.* (1) Capture in a record-keeping system and embed in each image file the following administrative metadata:



TABLE 1 TO PARAGRAPH (c)(1)

| Metadata label                                | Description                                                                                                                                                                                                             | Requirement level                                                                                              |
|-----------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|
| Identifier: File Name .....                   | The complete name of the computer file, including its extension                                                                                                                                                         | Mandatory.                                                                                                     |
| Identifier: Record ID .....                   | The unique identifier assigned by an agency or a records management system. § 1236.20(b)(1) requires that agencies assign unique identifiers to each record.                                                            | Mandatory.                                                                                                     |
| Identifier: Disposition Schedule Item # ..... | The number assigned to the disposition schedule item to which the record belongs.                                                                                                                                       | Mandatory.                                                                                                     |
| Relation: Has Part .....                      | A related record that is either physically or logically required in order to form a complete record. Mixed-media files that contain records on multiple media types should use this element to identify all components. | Mandatory if a record includes multiple parts, such as the component parts of a case file or mixed-media file. |
| Relation: Is Part Of .....                    | A related record or file in which the described record is physically or logically included. Records that are components of mixed media files should use this element to indicate their status.                          | Mandatory if file is a component of a multi-part record.                                                       |

(2) Capture in a record-keeping system and embed in each file any of the following access and use restrictions

metadata inherited from the original source records:

TABLE 2 TO PARAGRAPH (c)(2)

| Metadata label              | Required fields                                            | Description                                                                                                                                                                                                                                                                                                                              | Requirement level                                     |
|-----------------------------|------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------|
| Access Restrictions         | Access Restriction Status.<br>Specific Access Restriction. | Indicate whether or not there are access restrictions on the record.<br>Specific access restrictions on the record, based on national security considerations (e.g., CNSI, CUI), donor restrictions, court orders, and other statutory or regulatory provisions, including Privacy Act and Freedom of Information Act (FOIA) exemptions. | Mandatory.<br>Mandatory if access restriction exists. |
| Use Restrictions .....      | Use Restriction Status.<br>Specific Use Restriction.       | Indicate whether or not there are use restrictions on the record<br>The type of use restrictions on the record, based on copyright, trademark, service mark, donor, or statutory provisions, including Privacy Act and Freedom of Information Act (FOIA) exemptions.                                                                     | Mandatory.<br>Mandatory if use restriction exists.    |
| Rights: Rights Holder ..... |                                                            | A person or organization owning or managing intellectual property rights relating to the record.                                                                                                                                                                                                                                         | Mandatory if there is a rights holder.                |

(d) *Descriptive metadata.* Capture the following descriptive metadata from source records at the lowest level needed to support access and preservation and to maintain contextual information. Depending on your agency's existing record-keeping practices and level of intellectual

control, you may use information from the record series, file unit, or project level as the source for administrative and descriptive metadata fields. If the components of a record have not been individually indexed with unique descriptions, you may apply the series or file unit level descriptions to all of

the image files within that grouping. If the components of the record do not have individual titles, you must apply the item Record IDs instead. Retain the metadata in a record-keeping system for each image file:

TABLE 3 TO PARAGRAPH (d)

| Metadata label            | Description                                                                                                                                             | Requirement level |
|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Title .....               | A name given to the original record. If a name does not exist, the mandatory metadata element Identifier: Record ID serves as the title for the record. | Mandatory.        |
| Description .....         | A narrative description of the content of the record, including abstracts for document.                                                                 | Mandatory.        |
| Creator .....             | The agent (person, agency, other organization, etc) primarily responsible for creating the original record.                                             | Mandatory.        |
| Date: Creation Date ..... | The date or date range indicating when the original record met the definition of a Federal record.                                                      | Mandatory.        |
| Source Type .....         | The medium of the original source record scanned to create a digital still image.                                                                       | Mandatory.        |
| Source Dimensions .....   | The dimensions of the original source record (including unit of measure).                                                                               | Mandatory.        |

(e) *Technical metadata.* (1) Technical metadata is the metadata the scanning equipment generates during the digitization process.

(2) Embed image files with the following technical metadata describing the digitization process and the resulting electronic records, and ensure

that image processing does not delete or alter it:

TABLE 4 TO PARAGRAPH (e)(2)

| Metadata label                          | Definition                                                                          | Requirement level                     |
|-----------------------------------------|-------------------------------------------------------------------------------------|---------------------------------------|
| File Size .....                         | The size in bytes of the image file .....                                           | Mandatory.                            |
| Format Name and Version .....           | The format name or description of the file format .....                             | Mandatory.                            |
| Image Width .....                       | The width of the digital image, <i>i.e.</i> , horizontal or X dimension, in pixels. | Mandatory.                            |
| Image Height .....                      | The height of the digital image, <i>i.e.</i> , vertical or Y dimension, in pixels   | Mandatory.                            |
| Color Space .....                       | The well-defined name of the International Color Consortium (ICC) profile used.     | Mandatory.                            |
| Date and Time Created .....             | The Date or Date Time the digital image was created .....                           | Mandatory.                            |
| Scanner Make and Model .....            | The manufacturer and model of the scanner used to create the image.                 | Mandatory if using a scanner.         |
| Scanning Software Name and Version .... | The name and version of the software the scanner uses to create the image.          | Mandatory if using scanning software. |
| Digital Camera Make and Model .....     | The manufacturer and model of the digital camera used to create the image.          | Mandatory if using a digital camera.  |
| Samples Per Pixel .....                 | The number of color components per pixel .....                                      | Mandatory.                            |

(3) When digitization and image processing are complete and when you determine that the records are no longer in active use and no longer subject to

changes that would alter a checksum, you must generate checksums, record them as technical metadata in a record-keeping system for each image file, and

use them to monitor electronic records for corruption or alteration:

TABLE 5 TO PARAGRAPH (e)(3)

| Fixity metadata label           | Description                                                                                      | Requirement level |
|---------------------------------|--------------------------------------------------------------------------------------------------|-------------------|
| Message Digest Algorithm .....  | The specific algorithm used to construct the message digest for the digital object or bitstream. | Mandatory.        |
| Message Digest (checksum) ..... | The output of Message Digest Algorithm .....                                                     | Mandatory.        |

(f) *Transfer metadata.* (1) When you transfer digitized records to NARA's legal and physical custody, you must also transfer the associated metadata

specified by paragraphs (c), (d), and (e) of this section.

(2) In addition, you will need to enter the following separate metadata into the

Electronic Records Archive (ERA) when you create the Transfer Request (TR) to begin transferring the records:

TABLE 6 TO PARAGRAPH (f)(2)

| Metadata label         | Required fields             | Description                                                                                                                                                                                                                                                                        | Requirement level |
|------------------------|-----------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Transfer Title .....   | Transfer Title .....        | The name assigned to the collection, set or series of records you are transferring to NARA.                                                                                                                                                                                        | Mandatory.        |
| Dates .....            | Inclusive Start Date        | The beginning date on which the record group, collection, series, or set you are transferring to NARA was created, maintained, or accumulated by the creator.                                                                                                                      | Mandatory.        |
|                        | Inclusive End Date ..       | The last date on which the record group, collection, series, or set you are transferring to NARA was created, maintained, or accumulated by the creator.                                                                                                                           | Mandatory.        |
| Creating Organization. | Creating Organization.      | The name of the organization responsible for creating, accumulating, or maintaining the collection, series, or set when in working (primary) use.                                                                                                                                  | Mandatory.        |
| Record Group Number.   | Parent Record Group Number. | The unique number assigned to a record group .....                                                                                                                                                                                                                                 | Mandatory.        |
| General Records Type.  | General Records Type.       | The general form of the records set, series, or collection you are transferring, such as: architectural and engineering drawings, artifacts, data files, maps and charts, moving images, photographs and other graphic materials, sound recordings, textual records, or web pages. | Mandatory.        |
| Access Restrictions    | Access Restriction Status.  | Indicate whether or not there are access restrictions on the set, collection, or series of records you are transferring to NARA.                                                                                                                                                   | Mandatory.        |

TABLE 6 TO PARAGRAPH (f)(2)—Continued

| Metadata label          | Required fields              | Description                                                                                                                                                                                                                                                                                     | Requirement level                       |
|-------------------------|------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|
| Use Restrictions .....  | Specific Access Restriction. | Specific access restrictions on the set, collection, or series of records, based on national security considerations (e.g., CNSI, CUI), donor restrictions, court orders, and other statutory or regulatory provisions, including Privacy Act and Freedom of Information Act (FOIA) exemptions. | Mandatory if access restriction exists. |
|                         | Use Restriction Status.      | Indicate whether or not there are use restrictions on the set, collection, or series of records you are transferring to NARA.                                                                                                                                                                   | Mandatory.                              |
|                         | Specific Use Restriction.    | The type of use restrictions on the set, collection, or series of records, based on copyright, trademark, service mark, donor, or statutory provisions, including Privacy Act and Freedom of Information Act (FOIA) exemptions.                                                                 | Mandatory if access restriction exists. |
| Record Schedule Number. | Records Schedule Number.     | The number NARA assigned to the record schedule that applies to all the records in the collection, series, or set you are transferring.                                                                                                                                                         | Mandatory.                              |

**§ 1236.56 Quality control (QC) inspection requirements.**

(a) You must design a QC plan to document and correct errors due to malfunctioning or improperly configured digitization equipment, improper software application settings, incorrect metadata capture, or human error. You should perform QC inspections of files for compliance with all parameters and criteria identified for QA in parts §§ 1236.48 through 1236.54.

(b) You must select equipment that meets or exceeds identified parameters. To determine that digitization devices are capable of meeting imaging parameters, you must conduct an image quality analysis process and use device-level reference targets.

(c) QC procedures must verify that digital image files:

(1) Meet file format requirements specified in § 1236.48,

(2) Comply with the file attribute and technical evaluation parameter tolerance ranges specified in § 1236.50, and

(3) Meet the metadata requirements specified in § 1236.54.

(d) You must inspect a random sample of either ten images or 10% of each batch of digital images, whichever is larger, for the following characteristics:

(1) *File quality*: You can open and view the files; they are well-formed according to the specified file format in § 1236.48; they have the correct pixel dimensions; they are encoded with the correct color mode, bit depth, color profile, and, if compressed, they are compressed as specified in § 1236.50. You may verify file quality using automated techniques.

(2) *Image quality*: Ensure that digital files meet image quality parameters (spatial resolution, image tone, brightness, contrast, and color accuracy) specified in § 1236.50; that the files have no clipping (missing detail lost in

highlights or shadows), channel misregistration, or quantization errors; and that the informational content of the record is not compromised by excessive image artifacts (dust, Newton's rings, missing pixels, scan lines, drop-outs, flare, or over-sharpening).

(i) You should inspect image quality attributes on a color-managed computer.

(ii) Perform a visual review to assure images are accurate and consistent. Verify the files are not dimensionally distorted, have correct orientation (portrait/vertical, landscape/horizontal, horizontally or vertically flipped), and informational content is not cropped.

(iii) Conduct visual evaluation of images at 100% magnification on a color-managed computer monitor.

(iv) In addition to conducting visual inspections, you may also verify digital file specifications using automated techniques.

(v) Conduct manual QC inspections to evaluate subjective factors, such as appearance or legibility.

(3) *Metadata quality*: Ensure that files are named according to project specifications, that correct administrative, descriptive, and technical metadata are captured in a record-keeping system, and correct metadata elements are embedded in file headers.

(i) You must conduct manual QC inspections to evaluate the accuracy of metadata.

(ii) You may also evaluate the accuracy of metadata using automated techniques, if applicable.

(4) If you detect errors during inspection, perform the following steps to ensure that the specifications and requirements in §§ 1236.41 through 1236.56 have been met:

(i) If 1% or more of examined records fail to meet any of the criteria in this subpart, determine the source and scope of any errors, correct or re-digitize affected records, and conduct additional

inspections of 10% random samples until you achieve a 100% success rate for the sample set;

(ii) If less than 1% of examined records fail to meet any of the criteria in this subpart, determine the source and scope of any errors and correct or re-digitize the affected records.

(e) You must conduct a QC inspection for completeness. You must:

(1) Employ automated and visual inspection processes to verify record completeness;

(2) Visually compare source records with their digitized versions to verify that 100% of the source materials have been captured and accounted for, and that the digitized records are in the same order as the original;

(3) Verify that all records have been accounted for by referring to box lists, folder title lists, or other inventories;

(4) Verify that all sources of record information have been digitized by examining records for related envelopes, notes, or other forms of media. If another form of media is present that cannot be digitized, associate it with the digitized records using the Relation metadata elements in 1236.54(c); and

(5) Identify and document any missing pages or images (and you will note this information in the Details section of the ERA Transfer Request (TR) when transferring the records).

**§ 1236.58 Validating digitized records and disposition instructions.**

(a) When you complete a digitization project, you must validate that the digitized versions meet the standards in §§ 1236.41 through 1236.56.

(b) The validation should be conducted by separate staff, independent from the staff that performed the digitization QC inspections described in § 1236.56.

(c) To conduct the validation, you must verify that:

(1) All records identified in the project's scope have either been

digitized or were originally identified in project documentation as missing or incomplete records (and you will note this information in the Details section of the ERA Transfer Request (TR) when transferring the records);

(2) All required metadata is accurate, complete, and correctly labeled;

(3) All image technical attributes specified in § 1236.50 have been met;

(4) All image files are legible and the smallest level of detail necessary to understand and use the records has been captured;

(5) Mixed-media files are digitized appropriately for the material type, or if mixed-media components are retained in their original format, they are associated with digitized components through metadata, per the requirements specified in § 1236.54; and

(6) Project documentation has been created according to § 1236.46.

(d) After validating, you must determine whether or not the agency has any reasons for retaining the original source records for a period of time once digitized. See § 1236.40(f).

(e) After validating, you may dispose of the original source records pursuant to a NARA-approved records schedule that addresses disposition after digitization.

(f) Agencies cannot use the GRS to dispose of original source records if the digitized records do not meet the requirements in this subpart. In such cases, agencies should contact the Records Management Policy and Standards Team at [rmstandards@nara.gov](mailto:rmstandards@nara.gov) to determine what steps they must take to be able to transfer the records to the National Archives.

(g) Agencies must retain the project documentation described in § 1236.46 until the National Archives confirms receipt of the records and legal custody of the records has been transferred.

(h) Agencies must transfer the administrative, technical, and descriptive metadata captured during the digitization project, as defined in § 1236.54, with the digitized records.

**David S. Ferriero,**

*Archivist of the United States.*

[FR Doc. 2020-26239 Filed 11-30-20; 8:45 am]

**BILLING CODE 7515-01-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R2-ES-2019-0019; FF09E21000 FXES11110900000 212]

RIN 1018-BD29

#### Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Peppered Chub and Designation of Critical Habitat

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the peppered chub (*Macrhybopsis tetranema*) as endangered or threatened under the Endangered Species Act of 1973, as amended (Act). The peppered chub is a freshwater fish historically found in Colorado, Kansas, New Mexico, Oklahoma, and Texas, and is now extirpated in all but approximately 6 percent of its historical range. After review of the best available scientific and commercial information, we find that listing the peppered chub is warranted due to a dramatic reduction in the species' range (a loss of all but one population) and the low resiliency level of the remaining population. The primary stressors affecting the peppered chub are habitat fragmentation and degradation resulting from several sources, as discussed in this document and its supporting materials. Because we have found the species is at risk of extinction, we propose to list the peppered chub as an endangered species under the Act. If we finalize this rule as proposed, it would add this species to the List of Endangered and Threatened Wildlife and extend the Act's protections to the species. We also propose to designate critical habitat for the peppered chub under the Act. The proposed critical habitat designation includes approximately 1,068 river miles (1,719 river kilometers) in four units in Kansas, New Mexico, Oklahoma, and Texas. We announce the availability of a draft economic analysis of the proposed critical habitat designation.

**DATES:** We will accept comments received or postmarked on or before February 1, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public

hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 15, 2021.

**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-2019-0019, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R2-ES-2019-0019, U.S. Fish and Wildlife Service, MS: PRB/3W, 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:** Debra Bills, Field Supervisor, U.S. Fish and Wildlife Service, Arlington Ecological Services Field Office, 2005 Northeast Green Oaks Boulevard, Suite 140, Arlington, TX 76006; telephone 817-277-1100. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Executive Summary

*Why we need to publish a rule.* Under the Act, if we determine that a species may be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. To the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designation of critical habitat can only be completed by issuing a rule.

*What this document does.* We propose to list the peppered chub as an endangered species under the Act, and we propose the designation of critical habitat for the species.

*The basis for our action.* Under the Act, we may determine that a species is

an endangered or threatened species based on any of five 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. We are also required to consider any conservation measures made by any State or foreign nation regarding the species. We have determined that habitat degradation and fragmentation (Factor A), resulting from altered flow regimes, impoundments and other stream fragmentation, adversely modified geomorphology, decreased water quality, and the introduction and proliferation of invasive species (aquatic and vegetative), pose the largest risk to the viability of the species. Changes in the hydrological regime are primarily related to habitat changes: The loss of flowing water, instream habitat fragmentation, disconnection of the floodplain, and impairment of water quality. The effects of climate change (Factor E) may be exacerbating habitat degradation and fragmentation. Although habitat degradation and fragmentation are the primary stressor to the peppered chub, *Risk Factors for Peppered Chub*, below, presents a broader discussion of the threats. We have found that there are no existing regulatory mechanisms that adequately reduce the threats acting on the species to sufficiently reduce the risk of extinction (Factor D). We are aware of no other conservation efforts at this time that sufficiently reduce the risk of extinction. The Service, State, and academic partners are conducting monitoring efforts, and plans for captive propagation efforts are underway.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the

Secretary will make the designation on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

**Peer Review.** In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of seven appropriate specialists regarding the species status assessment report, which informed this proposed rule. The purpose of peer review is to ensure that the science behind our listing and critical habitat designations is based on scientifically sound data, assumptions, and analyses. Although we made several attempts to obtain responses from the peer reviewers, we did not receive a review from any of them. We received review from eight experts outside the Service (State and academic), who also collaborated with our species status assessment team during the species status assessment process, so they cannot be considered totally independent peer reviewers. Consequently, we are reengaging with the existing peer reviewers, and others as needed, to gain additional expert review and will consider any comments received, as appropriate, before a final agency determination.

Because we will consider all comments and information we receive 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 is threatened instead of endangered, 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.

#### 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 other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

- (1) The species' biology, range, and population trends, including:
  - (a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;
  - (b) Genetics and taxonomy;
  - (c) Historical and current range, including distribution patterns;
  - (d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

- (2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to the species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of the species, including the locations of any additional populations.

(5) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information to inform the following factors such that a designation of critical habitat may be determined to be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(d) No areas meet the definition of critical habitat.

(6) Specific information on:

(a) The amount and distribution of peppered chub habitat;

(b) What areas, that were occupied at the time of listing (*i.e.*, are currently occupied) and that contain the physical or biological features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments regarding:

(i) Regarding whether occupied areas are adequate for the conservation of the species; and,

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and, contain at least one physical or biological feature essential to the conservation of the species.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the benefits of including or excluding areas that may be impacted.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(10) Information on land ownership within proposed critical habitat areas, particularly tribal land ownership (allotments, trust, and/or fee) so that the Service may best implement Secretarial Order 3206 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act).

(11) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. Specific information we seek includes:

(a) The extent to which the existing State critical habitat designation in Kansas provides for the conservation of the species and its habitat in that State;

(b) The effectiveness of the management plan for the Arkansas River

shiner (*Notropis girardi*) for the Canadian River from U.S. Highway 54 at Logan, New Mexico, to Lake Meredith, Texas, in providing conservation for the peppered chub in Texas; and

(c) Information on any other conservation plans within the proposed designated critical habitat areas that provide conservation for the peppered chub and its habitat.

(12) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(13) Ongoing or proposed conservation efforts which could result in direct or indirect ecological benefits to the associated habitat for the proposed species; as such those efforts would lend to the recovery of the species and therefore areas covered may be considered for exclusion from the final critical habitat designation.

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 proposal, if requested. Requests must be received by the date specified above in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the 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 regulations at 50 CFR 424.16(c)(3).

### Previous Federal Actions

Forest Guardians (now WildEarth Guardians) petitioned us to list *Macrhybopsis tetranema* in 2007. The Service published a 90-day finding on December 16, 2009 (74 FR 66866) determining that the petition contained substantial information that listing *Macrhybopsis tetranema* (with a common name in that document of Arkansas River speckled chub) may be warranted. This proposed listing rule also constitutes our 12-month petition finding for the species.

### Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the peppered chub. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The Service sent the SSA report to seven independent peer reviewers; however, no peer reviewer provided a review of the document. The Service also sent the SSA report to 21 partners, including scientists with expertise in fish biology, habitat management, and stressors (factors negatively affecting the species) to the species, for review. We received review from eight (five State and three academic) partners.

### Availability of Supporting Materials

For the proposed listing of the peppered chub, the SSA report and other materials relating to this proposal can be found on the Arlington Ecological Services Field Office website at <https://www.fws.gov/southwest/es/>

ArlingtonTexas/and at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2019-0019.

For the proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the administrative record and are available at <https://www.fws.gov/southwest/es/ArlingtonTexas/> and at <http://www.regulations.gov> under Docket No. Docket No. FWS-R2-ES-2019-0019. Any additional tools or supporting information that we may develop for the critical habitat designation will also be available at the Service website set out above, and may also be included in the preamble of this proposal and/or at <http://www.regulations.gov>.

## I. Proposed Listing Determination

### Background

The peppered chub is historically known throughout the Arkansas River basin in Colorado, Kansas, New Mexico, Oklahoma, and Texas. Peppered chub were typically found in main channels of wide, shallow, sandy-bottomed rivers. The species prefers shallow channels where currents flow over clean fine sand, and generally, adults avoid calm waters and silted stream bottoms. Peppered chub have adapted to tolerate the adverse conditions of the drought-prone prairie streams that they inhabit. The peppered chub is a small cyprinid minnow with a fusiform (tapering at both ends) body shape rapidly tapering to a conical head. It has a nearly transparent slender body with dark dots scattered on its back. Generally, adult fish reach a maximum length of 3 inches (in) (77 millimeters (mm)) and do not live beyond 2 years. A full description of the species and its habitat can be found in chapter 2 of the SSA report.

Gilbert first described the peppered chub in 1886 (pp. 208–209). Prior to Eisenhower's 1999 dissertation (published 2004), the peppered chub was classified as one of six subspecies within the *Macrhybopsis aestivalis* (commonly: Speckled chub) complex. Eisenhower examined morphometrics (measurements of external shape), meristics (counts of features of fish), pigmentation, and tuberculation across the range of the complex. He concluded that the results supported the recognition of five individual species, including *Macrhybopsis tetranema*, or peppered chub. The American Fisheries Society also accepts the species as the peppered chub (Page *et al.* 2013, p. 28).

Habitat for the peppered chub historically consisted of the main channels of wide, shallow, sandy-bottomed rivers and larger streams of

the Arkansas River basin, with a noted preference for river segments nearer the headwaters, as compared to other *Macrhybopsis* in the Arkansas River basin. Adults prefer shallow channels where currents flow over clean fine sand, and generally avoid calm waters and silted river bottoms. Peppered chub have key adaptations that enable them to tolerate the adverse conditions of the drought-prone prairie rivers that they inhabit, including a relatively high capacity to endure elevated temperatures and low dissolved oxygen concentrations. They also appear to be often associated with turbid waters.

Peppered chub are members of a reproductive guild that broadcast-spawn semibuoyant eggs, which remain suspended in the water column by the current until hatching. This reproductive strategy appears to be an adaptation to highly variable environments where stream flows are unpredictable and suspended sediment deposition can cover eggs laid in nests or crevices. Without continuous stream flow of sufficient distance, eggs sink to the bottom where they may be covered with silt and suffocate due to the lack of oxygen. In addition to adequate stream discharge, an appropriate reach length is also needed to allow the time necessary for egg and larval development into a motile, free-swimming stage. After hatching, flowing water provides the extended development time needed by larval fish. Larval fish may require strong currents to keep them suspended in the water column until they are capable of horizontal movement and until the fish are strong enough to leave the main channel.

### Regulatory and Analytical Framework Regulatory Framework

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 is an “endangered species” or a “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.” The Act requires that 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.

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 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 must 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 Services 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.

#### Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be proposed for listing as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at <https://www.fws.gov/southwest/es/ArlingtonTexas/> and at

<http://www.regulations.gov> under Docket No. FWS-R2-ES-2019-0019.

To assess peppered chub viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species’ ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species’ viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species’ life-history needs. The next stage involved an assessment of the historical and current condition of the species’ demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species’ responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

#### *Summary of Biological Status and Threat*

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species’ current and future condition, in order to assess the species’ overall viability and the risks to that viability.

#### Summary of Analysis

A full description of our analysis (analytical methods, threats, current condition, and future condition for the peppered chub can be found in the SSA report (Service 2018); below, we present a summary of the results of the SSA.

To evaluate the current and future viability of the peppered chub, we assessed a range of conditions to allow us to consider the species’ resiliency, representation, and redundancy. The peppered chub historically inhabited numerous rivers of the Arkansas River basin, and without the presence of dams or other structures, it is likely that individuals within populations exhibited some level of genetic exchange among these rivers. To analyze population-level resiliency, we divided the range of the peppered chub into five “resiliency units” or populations (we use those terms interchangeably in this document) (see figure below; we do not include the Lower Arkansas River in the resiliency units for the SSA for the peppered chub because that portion of the watershed is not part of the historical range of the species). We described population resiliency and assessed representation and redundancy among these units. However, to assess conditions within each resiliency unit at a somewhat finer scale, we subdivided each resiliency unit into multiple subunits. This downscaling allows us to compare differences in conditions within a given resiliency unit and to understand the drivers affecting current condition (see the SSA report for further details).



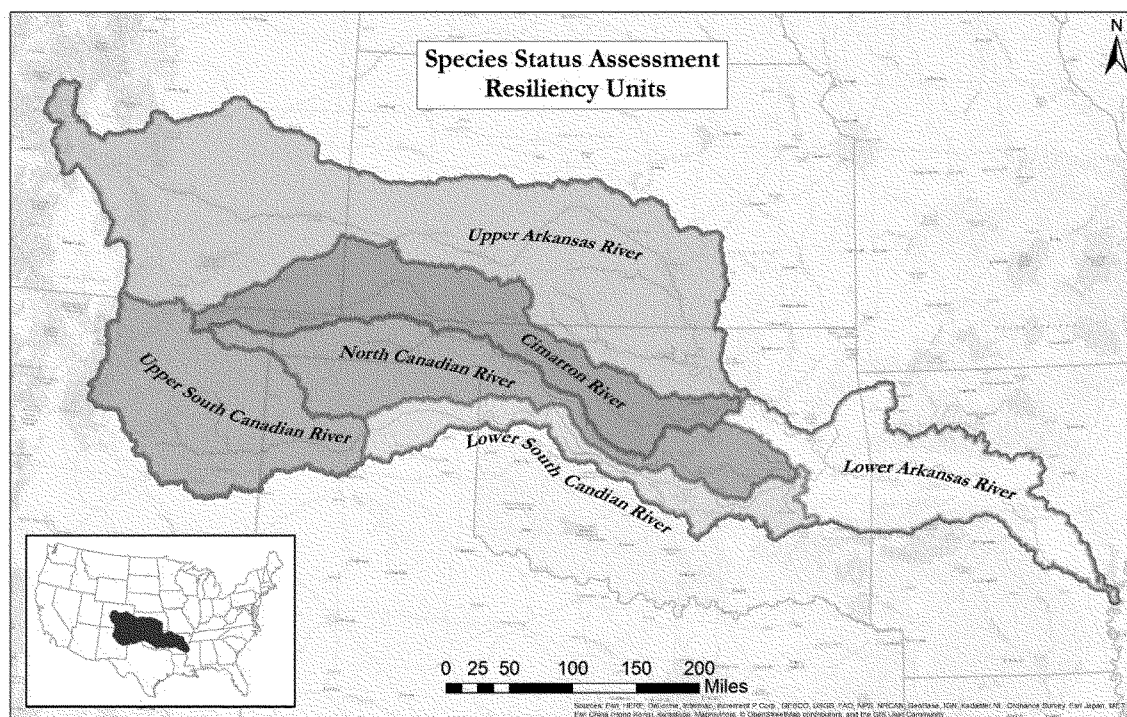


**Figure of Resiliency Units (excluding Lower Arkansas River) for the Arkansas River Shiner and Peppered Chub Species Status Assessment.**

To assess resiliency (within each resiliency unit), we analyzed capture ratios, probability of capture trends, and relative abundance (demographic factors). We also analyzed habitat factors that were determined to have the most influence on the species: Stream

fragment length, channel narrowing, flood frequency, hydroperiod (changes to the annual hydrograph most relevant to the species' lifecycle), and low flow conditions (habitat/flow factors). Overall resiliency unit condition rankings were determined by combining

the three demographic factors and five habitat/flow factors. For a more detailed description of the conditions categories, see Tables 1 and 2, below, and find full descriptions of each factor analysis in the SSA report.

**TABLE 1—DEMOGRAPHIC FACTORS USED TO CREATE CONDITION CATEGORIES FOR THE RESILIENCY ASSESSMENT OF PEPPERED CHUB (PC)**

| Condition category                             | Capture ratio         | Probability of capture trend | Relative abundance |
|------------------------------------------------|-----------------------|------------------------------|--------------------|
| <i>Null (0)</i> (factor no longer measurable). | No PC captured .....  | No PC captured .....         | No PC captured.    |
| <i>Poor</i> .....                              | 0.18 or less .....    | Declining .....              | Less than 3%.      |
| <i>Fair</i> .....                              | 0.19 to 0.74 .....    | N/A .....                    | 3 to 10%.          |
| <i>Good</i> .....                              | 0.75 or greater ..... | Stable or increasing .....   | Greater than 11%.  |

**TABLE 2—HABITAT FACTORS USED TO CREATE CONDITION CATEGORIES FOR THE RESILIENCY ASSESSMENT OF PEPPERED CHUB (PC)**

| Condition category | Stream fragment length                                                                                                | Channel narrowing <sup>1</sup>                                      | Flood frequency analysis <sup>2</sup> | Hydroperiod <sup>3</sup>       | Low flow conditions <sup>4</sup>      |
|--------------------|-----------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|---------------------------------------|--------------------------------|---------------------------------------|
| <i>Null</i> .....  | Less than 63 river miles (pelagic extirpation).                                                                       | Greater than 90% loss of channel area; less than 10 acres per mile. | Less than 10%                         | Greater than a 90% decrease.   |                                       |
| <i>Poor</i> .....  | 64 to 126 river miles (between pelagic extirpation and species threshold).                                            | 50 to 89% loss of channel area; 10 to 49 acres per mile.            | Between 10 and 50%.                   | Between a 25 and 90% decrease. | Increasing pattern or high frequency. |
| <i>Fair</i> .....  | 127 to 185 river miles (above the PC's needs threshold, but below the combined pelagic broadcast-spawning threshold). | 25 to 50% loss of channel area; 50 to 99 acres per mile.            | Between 50 and 75%.                   | Between a 10 and 25% decrease. | Cyclical pattern.                     |

TABLE 2—HABITAT FACTORS USED TO CREATE CONDITION CATEGORIES FOR THE RESILIENCY ASSESSMENT OF PEPPERED CHUB (PC)—Continued

| Condition category | Stream fragment length                                                                                                          | Channel narrowing <sup>1</sup>                                | Flood frequency analysis <sup>2</sup> | Hydroperiod <sup>3</sup>                | Low flow conditions <sup>4</sup>     |
|--------------------|---------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|---------------------------------------|-----------------------------------------|--------------------------------------|
| Good .....         | Greater than 185 river miles (no extirpation of pelagic broadcast-spawning fishes anticipated, based on fragment length alone). | 24% or less loss of channel area; 100 or more acres per mile. | Greater than 75%.                     | From a positive gain to a 10% decrease. | Decreasing pattern or low frequency. |

<sup>1</sup> Loss of channel area is measured since the 1950s.

<sup>2</sup> Flood frequency analysis is the weighted sum of the proportional differences for the 2-, 5-, and 10-year events between pre- and post-impoundment.

<sup>3</sup> Hydroperiod is the percent difference in stream discharge (mean daily, March-November) between pre- and post-impoundment.

<sup>4</sup> Low flow conditions are measured in the number of days of less than 0.57 cubic meters per second (m<sup>3</sup>/s) (20 cubic feet per second (ft<sup>3</sup>/s)).

Maintaining representation in the form of genetic or ecological diversity is important to maintain the peppered chub's capacity to adapt to future environmental changes. The peppered chub must retain populations throughout its range to maintain the overall potential genetic and life-history attributes that can buffer the species' response to environmental changes over time. We define redundancy for the peppered chub as multiple, resilient populations (resiliency units) distributed throughout the species' historical range. Thus, multiple, resilient populations (or resiliency units), coupled with a relatively broad distribution, contribute to species-level viability.

#### Current Condition of Peppered Chub

Our analysis of current condition of the peppered chub is based on numerous scientific publications from species experts who concluded that by the year 2000, the peppered chub had significantly declined and was isolated to the Ninnescah River in Kansas and the South Canadian River between Ute Reservoir in New Mexico and Lake

Meredith in the Texas panhandle (Luttrell et al. 1999, p. 983; Eisenhour 1999, p. 975; Eisenhour 2004; Service 2018, pp. 53–57). More recently, we assessed the current condition using survey efforts from 1,826 collections (from 2013 to 2017) with only 38 of those (2 percent) containing the peppered chub. Extensive recent survey efforts show that the peppered chub distribution is currently limited to the South Canadian River between Ute Reservoir in New Mexico and Lake Meredith in the Texas panhandle, which represents 6 percent of its historical range. The ratio of positive to negative peppered chub surveys in the Upper South Canadian River dropped to 45 percent and peppered chubs were not collected in the Ninnescah River during this time.

Historically, the peppered chub was known from five populations found in Colorado, Kansas, New Mexico, Oklahoma, and Texas. Several factors were responsible for the extirpation of the peppered chub in each of the resiliency units. However, habitat degradation and fragmentation has been primarily a result of water diversion and

impoundments (*i.e.*, dams). Thus, the single remaining population has low resiliency (see Table 3, below).

We consider the peppered chub to have limited representation in the form of genetic and ecological diversity because only a single functioning population remains. Extirpated populations of peppered chub contained genetic and morphological variation that have been lost. As described in Osborne (2017, p. 9), the peppered chub has “considerable stocks of genetic diversity” within this single population; however, the species lacks the representation of species with multiple populations occurring across varying landscapes. Despite restrictions of its range due to impoundments and other habitat alterations, and a decline in abundance, it is possible that genetic variation is sufficient to allow for survival in the naturally occurring conditions of the arid prairie stream environments in which the species evolved. However, it is unknown if this species has the genetic variability or the time required to adapt to continuing habitat and flow alterations.

TABLE 3—CURRENT RESILIENCY OF THE PEPPERED CHUB

|                                                    | Demographic factors |                              |                    | Habitat factors        |                   |                    |                    |                  | Current resiliency |
|----------------------------------------------------|---------------------|------------------------------|--------------------|------------------------|-------------------|--------------------|--------------------|------------------|--------------------|
|                                                    | Capture ratio       | Probability of capture trend | Relative abundance | Stream fragment length | Channel narrowing | Flood frequency    | Hydroperiod        | Low Flow         |                    |
| Upper Arkansas (includes Ninnescah and Salt Fork). | Ø .....             | Ø .....                      | Ø .....            | Fair .....             | Fair to Good ...  | Poor & Good ...    | Poor & Good .....  | Poor & Good ...  | Ø.                 |
| Cimarron .....                                     | Ø .....             | Ø .....                      | Ø .....            | Good .....             | Null to Good ...  | Null & Fair .....  | Poor & Fair .....  | Poor & Good ...  | Ø.                 |
| North Canadian .....                               | Ø .....             | Ø .....                      | Ø .....            | Fair .....             | Null .....        | Null to Good ...   | Poor to Fair ..... | Poor to Good ..  | Ø.                 |
| Lower South Canadian .....                         | Ø .....             | Ø .....                      | Ø .....            | Good .....             | Null to Good ...  | Poor to Fair ...   | Poor to Fair ..... | Fair & Good ...  | Ø.                 |
| Upper South Canadian                               | Fair .....          | Good .....                   | Poor .....         | Fair .....             | Poor .....        | Null to Fair ..... | Null to Fair ..... | Poor to Fair ... | Low.               |

**Note:** The Ø symbol means null (having or associated with the value zero).

Because the peppered chub has been extirpated from all but one resiliency unit, it has a higher risk of extinction from a catastrophic event, due to a lack of redundancy across its range, compared to historical conditions.

See the SSA report for the complete current condition analysis for the peppered chub (Service 2018).

#### Risk Factors for Peppered Chub

Stressors affecting the viability of the peppered chub include altered flow regimes (Factor A), impoundments and other stream fragmentation (Factor A), modified geomorphology (Factor A),

decreased water quality (Factor A) and the introduction of invasive species (Factors A and C). The source of many of these stressors is related to the construction of dams and their impoundments (a body of water confined within an enclosure) which, in most cases, has drastically altered the natural flow regime and fragmented habitat. For example, a U.S. Geological Survey (USGS) stream gage on the Canadian River (near Amarillo, Texas) in the Lower South Canadian River resiliency unit has had a 69 percent decline in mean hydroperiod from pre-impoundment to post-impoundment, and the mean daily discharge (post-impoundment) is markedly lower (68% decline) since the completion of the reservoir.

#### Altered Flow Regimes

Peppered chub need a combination of varying flows (timing, duration, and magnitude) to support viable populations and maintain suitable habitat. Low flow periods (including isolated pooling) can impair or eliminate appropriate habitat for the species, and while adult peppered chub are adapted to and can typically survive these events for a short time, populations that regularly experience these conditions face compromised reproductive success and may not persist. Flow regime alterations that we considered during the SSA process include dams and their associated impoundments, the effects dams have on the natural flow regime, surface and groundwater extraction, and the effect of climate change on precipitation and drought.

#### Stream Fragmentation

Dams often fragment aquatic habitat and create impassable physical barriers to fish movement. Juvenile and adult peppered chub would likely be capable of passing downstream through small fish barriers such as weirs (low dams built to raise the level of water upstream), low-water crossings, and natural or manmade falls. However, no life stage of peppered chub is likely capable of successfully passing downstream through most reservoirs large enough to act as water supply or hydroelectric sources. Likewise, due to the small size and limited swimming ability of the peppered chub, upstream movement of adults (during spawning) would likely be prohibited by any impoundments (regardless of type or function), weirs, falls, pipeline reinforcements structures, and some low-water crossings.

It is unlikely that egg and larval stages of peppered chub are capable of passing

over a fish barrier. When fish (typically adults only) pass downstream of a smaller barrier, they remain isolated below the barrier and are unable to return to spawning areas upstream. This often results in incremental and progressive extirpation from an upstream to downstream direction (Perkin and Gido 2011, p. 374). Because of its need for flowing water to reproduce, peppered chub have been eliminated from shorter (generally less than 136 mi) reaches and typically persist only in river segments that are above a minimum threshold (Perkin and Gido 2011, p. 374). In addition, the blocking of movement of adult fish limits their ability to seek suitable habitat in more perennial, headwater reaches during drought conditions.

#### Modified Geomorphology

Decreases in stream flows in the South Canadian River have contributed to the decline or loss of wide, shallow sand-bed river channels that are characteristic of peppered chub habitat. Impoundments often reduce the magnitude and frequency of high flows, leading to bank stabilization and channel narrowing; alter streambank riparian communities; restrict downstream transport of nutrients that support ecosystem development; and alter river substrate (Poff *et al.* 1997, pp. 773–777; Mammoliti 2002, pp. 223–224). Impoundments also alter streamflow by reducing the availability or timing of water, leading to more frequent low-flow conditions, channel drying, pool isolation, and vegetative encroachment into the river channel. Reduction in flows reduces the peppered chub's reproductive success and decreases population resiliency.

Additional alteration of historical physical habitat occurs when dams release sediment-starved water that alters the composition and distribution of the bed substrate. River and stream water velocity slows rapidly where water enters the standing water of reservoirs, resulting in the settlement of suspended sediment within the reservoir (Poff *et al.* 1997, p. 773). The resulting release of low turbidity, high-velocity water from dams scour the downstream reaches, causing the channel to incise and become further isolated from its natural floodplain. Further, such dam releases remove sand and gravel substrate preferred by the peppered chub. Decreased turbidity provides a competitive advantage to fishes that are not as well adapted to the naturally turbid water. When water is released from a main channel reservoir, fish species adapted to naturally turbid conditions of the South Canadian River,

such as the peppered chub, are displaced by fish with competitive advantage in less turbid conditions, resulting in a reduction in available habitat and increased predation (Bonner and Wilde 2002, pp. 1205–1206), thereby negatively influencing species distribution and abundance.

#### Degraded Water Quality

Suitable water quality is necessary for a healthy aquatic community. Water quality may become impaired through direct contamination or the alteration of freshwater chemistry. Contaminants enter the environment through both point and nonpoint sources including spills, industrial pathways, municipal effluents, and agricultural runoff. These sources may contribute organic compounds, heavy metals, pesticides, herbicides, and a wide variety of newly emerging contaminants to the aquatic environment. An additional type of water quality impairment is the alteration of water quality parameters such as dissolved oxygen, temperature, and salinity levels. Dissolved oxygen levels may be reduced due to increased nutrient levels (*i.e.*, nitrogen and phosphorous) from agricultural runoff or wastewater effluent (eutrophication). Increased water temperature from more frequent low-flow/drought conditions and climate change can also exacerbate low dissolved oxygen levels, particularly when low-flow conditions strand fish in isolated pools. Similarly, fish stranded in isolated pools can be subjected to naturally concentrated salinity. Additionally, many freshwater systems and shallow aquifers have become increasingly saline due to salinized water recharge (Hoagstrom 2009, p. 35). This effect largely stems from irrigation return flows that have flushed accumulated salts from irrigated lands back into the system.

Chloride concentrations have been increasing in the upper South Canadian River (Service 2018, p. 127). Additionally, arsenic levels in many of the rivers within the historical range of the peppered chub are above the Environmental Protection Agency's established levels for human health for the consumption of organisms but not above levels designed to protect freshwater aquatic communities. Arsenic levels have increased over time in the Cimarron River to the point that golden shiners (*Notemigonus crysoleucas*) exhibited avoidance behavior even though concentrations were below a toxic level (Hartwell *et al.* 1989, p. 452). It is a reasonable presumption that peppered chub would also demonstrate avoidance behavior at similar concentrations of arsenic,

causing peppered chub distribution and movements to be disrupted, possibly further fragmenting or reducing the amount of available stream length necessary for all life stages.

#### Introduction of Invasive Species

The alteration of the hydrologic regime and geomorphology of rivers resulting from impoundments can cause the proliferation of larger, piscivorous fish not normally associated with unimpounded prairie rivers. This fish community conversion is exacerbated by the transfer or stocking of game species in areas that have undergone hydrologic regime or geomorphologic alterations. These species may include smallmouth bass (*Micropterus dolomieu*), largemouth bass (*Micropterus salmoides salmoides*), Florida largemouth bass (*Micropterus salmoides floridanus*), striped bass (*Morone saxatilis*), and channel catfish (*Ictalurus punctatus*) (Howell and Mauk 2011, pp. 11–12), which may prey upon peppered chubs. In a system similar to the Arkansas River Basin, eighteen fish species were introduced or immigrated into the Solomon River basin following impoundment and increased competition from these nonnative species may have contributed to the decline of native fish species (Eberle *et al.* 2002, p. 182, 188). While peppered chub declines throughout the species' range cannot be fully attributed to predation by invasive fishes, a shifting fish community (to more lentic (still water) adapted species) throughout the Lower South Canadian River has coincided with the extirpation of the peppered chub throughout this lower basin. The Upper South Canadian River (between Ute Reservoir and Lake Meredith) is an exception, where the natural fish community is still mostly intact (Service 2018, pp. 66–68).

#### Synergistic Effects

Many of the above-summarized risk factors may act synergistically or additively on the peppered chub. The combined impact of multiple stressors is likely more harmful than a single stressor acting alone. For example, resiliency of the peppered chub (in the Upper South Canadian River resiliency unit) is considered low due to river impoundment in combination with other stressors acting synergistically. The river is unimpeded for 179 river miles (288 river kilometers), which translates to a fair condition (see Table 2, above). However, our flood frequency analysis in the Upper South Canadian River resiliency unit shows a decline to a level of null to fair, meaning flood events have significantly declined

compared to historical conditions. As a result, the river channel has narrowed dramatically in many areas, resulting in unfavorable habitat for the peppered chub and a poor condition category for this habitat metric. This condition limits the access to and formation of new habitat necessary for egg/larval retention and nursery. The hydroperiod (a comparison between pre-impoundment and post-impoundment discharge) has changed so that discharge is in a null (greater than 90 percent decrease in discharge) to fair condition for peppered chub. Lastly, the low-flow conditions in the stretch are in a poor to fair condition, meaning that low-flow days are common or increasing and some areas are vulnerable to drying in drought years, which could affect the length of unimpeded river and lead to additional channel narrowing. For a full explanation of our habitat factor analysis, see chapter 4 of the SSA report.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and cumulatively. Our current and future condition assessment is iterative because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

#### Conservation Actions

Conservation efforts are inadequate to prevent the need for listing, at this time. The Service, States (within the historical range of the peppered chub), and academic partners are conducting stream monitoring (general monitoring of fish community). Approximately 95 percent of the adjacent land within the historical range of the peppered chub is private land, and we are aware of no conservation plans or management activities that are in place with private landowners that are specific to the peppered chub.

The Canadian River Municipal Water Authority (in conjunction with several

other partners) has a management plan in place for the Arkansas River shiner, a similar species that shares many of the same life-history characteristics and habitat requirements as the peppered chub. This plan aims to maintain and improve habitat in the South Canadian River upstream of Lake Meredith in Texas, to Logan, New Mexico. This plan has been in place since 2005 and covers the last remaining occupied habitat for the peppered chub. The implementation of the management plan has improved riparian health through the removal of non-native trees and may have slowed the rate of habitat decline. However, this conservation plan, in its current form, is not sufficient to address the needs of this last remaining population of peppered chub. The plan does not address maintenance of flows required by peppered chub, including baseflows that maintain river connectivity allowing for fish movement and moderate to high flows that are effective in maintaining wide and complex river channels. Even with this conservation plan in place, habitat has continued to decline and current resiliency of the Upper South Canadian River is in a low condition (see Table 3, above).

This species is listed as endangered in Kansas and protected under the authority of the state's Nongame and Endangered Species Conservation Act of 1975. The Kansas Department of Wildlife, Parks and Tourism (KDWP) finalized a recovery plan for the peppered chub in May 2005. The recovery plan outlines specific strategies and methods to recover and delist the peppered chub in Kansas. The recovery plan also includes designated critical habitat (DCH) as required for endangered species conservation and recovery. Kansas Administrative Regulations (K.A.R.) 115–15–3 provides for review and a permit system for any alterations to DCH of which is administered by KDWP Ecological Services Section. Peppered chub DCH overlaps the federally proposed critical habitat Unit 3 in Kansas.

Efforts are underway regarding a captive propagation program at the Kansas Aquatic Biodiversity Center and at the Tishomingo National Fish Hatchery in Oklahoma. However, there are currently no peppered chub in captivity or being propagated for reintroduction efforts.

Although the above-mentioned efforts are appreciated, they are not adequate to protect the species from extirpation.

#### Future Scenarios

After considering the information in the SSA report, we determined the species is in danger of extinction now.

For that reason, we are not presenting the future scenarios we developed in the SSA; refer to the SSA report for a detailed description of the future scenarios that we considered in our analysis (Service 2018, pp. 123–141).

#### *Determination of Peppered Chub 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.” The Act requires that we determine whether a species meets the definition of “endangered species” or “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.

#### *Status Throughout All of Its Range*

The range of the peppered chub once included Colorado, Kansas, New Mexico, Oklahoma, and Texas, with populations in several streams and rivers. The peppered chub is now confined to a single population in the upper portion of the South Canadian River in Texas and New Mexico, which represents approximately 6 percent of the species’ historical range. The one remaining population has declined from an average of approximately 14 percent relative abundance (a component of biodiversity) historically, to a current relative abundance of under 2 percent, meaning the fish community structure has shifted significantly from its baseline condition. Explained in detail in the SSA report and below, the fish community in this population is shifting away from its historical state and the peppered chub is becoming less common compared to other species in the community, meaning the species richness of the community is declining (Service 2018, pp. 63–68). This population has a low resiliency condition category, meaning that the population has a low probability of remaining extant and withstanding periodic or stochastic disturbances

under its current condition. Representation has been reduced, with the loss of populations within its historical distribution. Species-level genetic and ecological diversity has been lost over time, as populations have become extirpated. Redundancy has declined dramatically because the peppered chub remains on the landscape in only one population. As such, the peppered chub is at greater risk of extinction due to a catastrophic event when compared to historical conditions.

The peppered chub faces threats from altered flow regimes (*e.g.*, dams and impoundments, groundwater extraction, and climate change effects on precipitation) (Factors A and E), stream fragmentation (Factor A), modified geomorphology (Factor A), poor water quality (Factor A), and introduction and proliferation of invasive species (Factors A and C). Because peppered chub rarely live beyond 2 years, the risk of species extinction from 2 (or more) successive years of low flow or drought conditions, is high. These threats are currently acting on the peppered chub, and we expect them to continue or worsen into the future. We found no evidence of population- or species-level impacts from overutilization for commercial, recreational, scientific, or educational purposes (Factor B). In our analysis of the factors affecting the peppered chub, we found that there are no existing regulatory mechanisms that adequately address threats to the species such that when considering those conservation efforts, the species would not warrant listing under the Act (Factor D).

After evaluating threats to the species and assessing the cumulative effects of the threats under the section 4(a)(1) factors, we find that the species’ resiliency, representation, and redundancy are at levels that put the species at risk of extinction throughout its range. Thus, after assessing the best available information, we conclude that the peppered chub meets the definition of an endangered species because it is in danger of extinction throughout all of its range. We find that a threatened species status is not appropriate for the peppered chub because it is currently at risk of extinction.

#### *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. We have determined that the peppered chub is in danger of extinction throughout all of its

range and accordingly did not undertake an analysis of any significant portion of its range. Because the peppered chub warrants listing as endangered throughout all of its range, our determination is consistent with the decision in *Center for Biological Diversity v. Everson*, 2020 WL 437289 (D.D.C. Jan. 28, 2020), in which the court vacated the aspect of the 2014 Significant Portion of its Range Policy that provided 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.

#### *Determination of Status*

Our review of the best available scientific and commercial information indicates that the peppered chub meets the definition of an endangered species. Therefore, we propose to list the peppered chub as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

#### *Available Conservation Measures*

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, as well as private organizations and individuals. The Act encourages cooperation with the States and other countries, and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species’ decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline

shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria to be considered when a species is being reviewed for reclassification from endangered to threatened ("downlisting") or removal from the List of Endangered and Threatened Wildlife or Plants ("delisting"), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outlines, draft recovery plans, and the final recovery plans will be available on our website (<http://www.fws.gov/endangered>), or from our Arlington Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands. If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Colorado, Kansas, New Mexico, Oklahoma, and Texas would be eligible for Federal funds to implement management actions that promote the protection or recovery of the peppered chub. Information on our grant programs that are available to aid

species recovery can be found at <http://www.fws.gov/grants>.

Although the peppered chub is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for the species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph may include, but are not limited to, management and any other landscape-altering activities on Federal lands including those administered by the Service, U.S. Forest Service, Bureau of Land Management, and National Park Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful

to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Authorized taking of peppered chub in accordance with a permit issued by us pursuant to section 10 of the Act or with the terms of an incidental take statement pursuant to section 7 of the Act, or possessing specimens of this species that were collected prior to the date of publication in the **Federal Register** of this final regulation adding this species to the list of endangered and threatened species;

(2) Normal, lawful recreational activities such as hiking, trail rides, camping, boating, hunting, and fishing, provided unused bait fish are not released back into the water;

(3) Normal livestock grazing and other standard ranching activities within riparian zones that do not destroy or significantly degrade peppered chub habitat;

(4) Routine implementation and maintenance of agricultural conservation practices specifically designed to minimize erosion of cropland (e.g., terraces, dikes, grassed waterways, and conservation tillage);

(5) Existing discharges into waters supporting the peppered chub, provided these activities are carried out in accordance with existing regulations and permit requirements (e.g., activities subject to sections 402, 404, and 405 of the Clean Water Act); and

(6) Improvements to existing irrigation, livestock, and domestic well structures, such as renovations, repairs, or replacement.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Take, which includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting any of these actions, of peppered chub without a valid permit;

(2) Capture, survey, or collection of peppered chub specimens without a permit from the Service under section 10(a)(1)(A) of the Act;

(3) Possess, sell, deliver, carry, transport, or ship illegally taken peppered chub;

(4) Introduction of non-native fish species that compete or hybridize with, displace, or prey upon peppered chub;

(5) Unauthorized destruction or alteration of peppered chub habitat by dredging, channelization, impoundment, diversion, recreational vehicle operation within the stream channel, sand or gravel removal, or other activities that result in the destruction or significant degradation of channel stability, streamflow/water quantity, substrate composition, and water quality used by the species for foraging, cover, and spawning;

(6) Unauthorized discharges (including violation of discharge permits), spills, or dumping of toxic chemicals, silt, household waste, or other pollutants (e.g., sewage, oil and gasoline, heavy metals) into surface or ground waters or their adjoining riparian areas that support/sustain peppered chub;

(7) Applications of pesticides, herbicides, fungicides and other chemicals, including fertilizers, in violation of label restrictions; and

(8) Withdrawal of surface or ground waters to the point at which baseflows in water courses (e.g., creeks, streams, rivers) occupied by the peppered chub

diminish and habitat becomes unsuitable for the species.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Arlington Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## II. Critical Habitat

### Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of

critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed,



upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical

habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

#### *Prudency Determination*

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed earlier in this document, there is currently no imminent threat of collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA and proposed listing determination for the peppered chub, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the peppered chub and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The species occurs wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the peppered chub.

#### *Critical Habitat Determinability*

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the species is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of "critical habitat."

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where the species is located. We find that this information represents the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the peppered chub.

#### *Physical or Biological Features Essential to the Conservation of the Species*

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR



424.12(b), in determining which areas we will designate critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection.

The regulations at 50 CFR 424.02 define “physical or biological features essential to the conservation of the species” as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

We derive the specific physical or biological features essential for the

peppered chub from studies of the species’ habitat, ecology, and life history. The primary habitat elements that influence resiliency of the species include water quality, water quantity, substrate, channel complexity, and stream length. A full description of the needs of individuals, populations, and the species is available in the SSA report.

#### Summary of Essential Physical or Biological Features

As we mentioned previously, peppered chub broadcast-spawn semibuoyant eggs, which remain suspended in the water column by the current until hatching. In addition to adequate stream discharge, an appropriate reach length is also needed to allow the time necessary for egg and larval development into a motile, free-swimming stage. After hatching, flowing water provides the extended development time needed by larval fish. Larval fish may require strong currents to keep them suspended in the water column until they are capable of horizontal movement and until the fish are strong enough to leave the main channel. Without continuous stream flow of sufficient distance, eggs sink to the bottom where they may be covered with silt and suffocate due to the lack of oxygen. We determined that streams from 127 to 185 river miles is a condition category of fair (Table 2) (chapters 2 and 3 of the SSA report) and represents the minimum distance necessary for peppered chub needs.

We summarized water quality and quantity habitat conditions that are conducive to presence of peppered chub in the SSA report in chapter 2. Studies cited in the SSA report outline the peppered chub tolerances to variations of water quality and quantity. Mortality was observed outside these thresholds outlined below, in many cases.

Native riparian vegetation is another essential component of peppered chub habitat, in that it provides bank stabilization, a terrestrial prey base, and can slow or reverse stream narrowing in areas where significant stream narrowing has occurred. Native riparian and floodplain vegetation minimizes impacts from salt cedar encroachment and other invasive and opportunistic species such as common reed and the newly documented ravenna grass and maintains wider, braided channels more suitable for successful reproduction (Service 2018, p. 37).

Peppered chub need adequate lengths of unimpounded flowing water free from an overabundance of predators, to successfully reproduce and maintain populations. Their historical range has

been fragmented by several impoundments. Reduced water velocities from impoundments increase the likelihood of establishment of new species or increased abundance of existing species more adapted to the lentic environment (Poff et al. 1997, p. 776). Lentic fish species are often top predators and can have negative impacts on smaller, riverine species (Poff et al. 1997, p. 777; Mammoliti 2002, p. 223). The resulting fish community often results in a lower relative abundance of peppered chub or in extirpation in the population. Thus, the peppered chub needs river management that results in conditions that favor the chub over lentic fish species.

We have determined that the following physical or biological features are essential to the conservation of the peppered chub:

(1) Unobstructed river segments greater than 127 river miles (rmi) (205 river kilometers (rkm)) in length that are characterized by a complex braided channel and substrates of predominantly sand, with some patches of silt, gravel, and cobble.

(2) Flowing water with adequate depths to support all life stages and episodes of elevated discharge to facilitate successful reproduction, channel and floodplain maintenance, and sediment transportation.

(3) Water of sufficient quality to support survival and reproduction, which includes, but is not limited to, the following conditions:

(i) Water temperatures generally less than 98.2 degrees Fahrenheit (°F) (36.8 degrees Celsius (°C));

(ii) Dissolved oxygen concentrations generally greater than 3.7 parts per million (ppm);

(iii) Conductivity generally less than 16.2 millisiemens per centimeter (mS/cm);

(iv) pH generally ranging from 5.6 to 9.0; and

(v) Sufficiently low petroleum and other pollutant concentrations such that reproduction and/or growth is not impaired.

(4) Native riparian vegetation capable of maintaining river water quality, providing a terrestrial prey base, and maintaining a healthy riparian ecosystem.

(5) A level of predatory or competitive, native or nonnative fish present such that peppered chub population’s resiliency is not affected.

#### *Special Management Considerations or Protection*

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the

species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the peppered chub may require special management considerations or protections to reduce the following threats: (1) Altered flow regimes, including (but not limited to) dams and impoundments and groundwater extraction; (2) stream fragmentation; (3) modified geomorphology; (4) poor water quality; (5) impacts from introduction of invasive species (fish and vegetation) and the introduction of native competitors for sport fishing; and (6) other stressors including (but not limited to) gravel mining and dredging, commercial bait fish harvesting, and off-road vehicle use.

Management activities that could ameliorate these threats include, but are not limited to: Development of groundwater conservation strategies; removal of impoundments or creation of fish passage, development of water release strategies for reservoirs; minimization of in-channel work from utility or road projects; maintenance of bank stability and revegetation of impacted areas; incorporation of integrated pest management strategies (for saltcedar (*Tamarix* spp.) and other invasive plants); and development of best management practices to reduce pollutant discharges and to develop water conservation measures that reduce the need for water diversions.

#### *Criteria Used To Identify Critical Habitat*

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.

The current distribution of the species is much reduced from its historical range. We anticipate that recovery will require continued protection of the existing population and its habitat, as well as reintroduction of peppered chub into historically occupied areas, ensuring there are adequate numbers in stable populations and that these populations occur over a wide geographic area. This strategy will help to ensure that catastrophic events, such

as the effects of drought, cannot simultaneously affect all known populations. Rangewide recovery considerations, such as maintaining existing genetic diversity and striving for representation of all major portions of the species' current range, were considered in formulating this proposed critical habitat.

Sources of data for this proposed critical habitat designation include multiple databases maintained by Arkansas Game and Fish Commission; Fishes of Texas; Colorado Parks and Wildlife Department; Kansas Department of Wildlife, Parks and Tourism; New Mexico Department of Game and Fish; New Mexico Interstate Stream Commission; Oklahoma Department of Environmental Quality; Texas Parks and Wildlife Department; Oklahoma State University; University of New Mexico Museum of Southwestern Biology; and New Mexico Department of Game and Fish, as well as numerous survey reports on rivers and streams throughout the species' range (see SSA report). We have also reviewed available information that pertains to the habitat requirements of this species. Sources of information on habitat requirements include studies conducted at occupied sites and published in peer-reviewed articles and agency reports, and data collected during monitoring efforts.

#### *Areas Occupied at the Time of Listing*

Our review of occupied range of the peppered chub is based on numerous species experts who concluded that by the year 2000, the peppered chub had significantly declined and was isolated to the South Fork Ninnescah River in Kansas and the South Canadian River between Ute Reservoir in New Mexico and Lake Meredith in the Texas panhandle. Using data from over 1,800 fish collections, we define "currently occupied" as river reaches with positive surveys from 2013 to 2017. By the year 2013, the peppered chub was no longer being observed in the Ninnescah River in Kansas, despite extensive survey efforts. The peppered chub continues to be observed in surveys in the South Canadian River between the Ute Reservoir and Lake Meredith, and this is the only area we considered to be currently occupied. We propose to designate one occupied unit as critical habitat for the peppered chub in the upper South Canadian River.

The one remaining population of peppered chub has a low level of resiliency (Table 3.) and because of its relatively short life cycle (~2 years), a series of back-to-back stochastic events could significantly reduce or extirpate

the remaining population. The peppered chub range has been highly restricted (~6 percent remaining); therefore, its adaptive capacity (representation) has been dramatically reduced. The significantly reduced range reduces peppered chub exposure to ecologically diverse habitats and reduces its ability to adapt to changing environments over time. A low resiliency single population provides little redundancy for the species and a single catastrophic event could cause species extinction. Consequently, we have determined that occupied area is inadequate to ensure the conservation of the species. Therefore, we have also identified, and are proposing for designation of critical habitat, unoccupied areas that are essential for the conservation of the species.

#### *Areas Outside the Geographic Area Occupied at the Time of Listing*

Because we have determined occupied areas alone are not adequate for the conservation of the species, we have evaluated whether any unoccupied areas are essential for the conservation of the species. We are proposing as critical habitat three units that are currently unoccupied. We have determined that each is essential for the conservation of the species. All three units have at least one of the physical or biological features essential to the conservation of the species and we are reasonably certain that each will contribute to the conservation of the species. Our specific rationale for each unit can be found below in the unit descriptions.

Peppered chub has been completely extirpated from all but a single river reach within its historical range. Additionally, the one remaining population was found to be in "low" condition in our resiliency analysis and protecting it alone would not sufficiently conserve the species. Additional healthy populations are needed because of the inherent threat from environmental stochasticity (such as a multi-year drought) and the possibility that the species could be extirpated in a relatively short period time, given a 2-year life cycle. Furthermore, a single catastrophic event could extirpate the last remaining population, therefore resulting in species extinction.

As a result, additional healthy populations of the peppered chub must be established to increase its viability and to recover the species. Having at least two resilient populations in the Canadian River and at least one population in each of the Ninnescah River and Cimarron River is essential for

the conservation of the peppered chub. These specific areas encompass the minimum area of the species' historical range within the proposed critical habitat designation, while still providing ecological diversity so that the species has the ability to evolve and adapt over time (representation) and ensure that the species has an adequate level of redundancy to guard against future catastrophic events. These areas also represent the areas within the historical range with the best potential for recovery of the species due to their current conditions and likely suitability for reintroductions.

The species' adaptive capacity (and therefore representation) is limited by its current range. Due to the species constricted range the species as a whole, is present only in a limited scope of its historical ecological setting and therefore has little to no opportunity to adapt to a changing environment over time. The unoccupied units that we have selected to designate for the peppered chub represent the smallest number of units that could be designated while still capturing the widest range of historical ecological settings and increasing redundancy.

Redundancy has been dramatically reduced and must be improved in order to have a viable species in the future. The peppered chub was once common among several streams throughout the Arkansas River Basin and was highly redundant because it existed in many streams across a range. The species now occurs in one river segment on a small portion of its historical range. The species needs healthy populations distributed across its historical range to guard against catastrophic events. The three units that were selected to capture the species historical ecological settings are also essential to increasing the redundancy of the species.

Accordingly, we propose to designate one unoccupied unit in the Canadian River, one unoccupied unit in the Cimarron River, and one unoccupied unit in the South Fork Ninescaw River. A single occupied unit is not sufficient to maintain the viability of the species over time. The range of the remaining population is dispersed across approximately six percent of the species' historical range providing significantly reduced ecological

diversity (representation), which reduces the potential for the species to adapt to a changing environment over time. This population provides little to no redundancy to guard against a catastrophic event.

Establishing healthy population in these three currently unoccupied units would increase the resiliency, representation and redundancy (viability) of the species. If established, each unoccupied unit contributes ecological diversity (representation) or guards against catastrophic events (redundancy) or both. As described below in the individual unit descriptions, each unit contains one or more of the PBFs and are reasonably certain to contribute to the conservation of the species.

#### General Information on the Maps of the Proposed Critical Habitat Designation

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the proposed critical habitat designation in the discussion of individual units, below. We will make the coordinates or plot points or both on which each map is based available to the public on <http://www.regulations.gov> under Docket No. FWS-R2-ES-2019-0019, and at the Arlington Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**, above). When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by pavement, buildings, and other structures because such lands lack physical or biological features necessary for the peppered chub. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands

would not trigger section 7 consultation under the Act with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

#### Proposed Critical Habitat Designation

We are proposing to designate approximately 1,068 rmi (1,719 rkm) in four units in Kansas, New Mexico, Oklahoma, and Texas as critical habitat for the peppered chub. One of the units is currently occupied by the species and contains those physical or biological features essential to the conservation of the species but may require special management considerations. Three of the units are currently unoccupied by the species but are essential to the conservation of the species. All units proposed may require special management considerations or protection to address habitat degradation resulting from the cumulative impacts of land use change and associated watershed-level effects on water quality, water quantity, substrate, channel complexity, unimpounded river length, and instream habitat suitability. These stressors are primarily related to habitat changes: The loss of flowing water, altered flow regimes, modified geomorphology, stream fragmentation, and impairment of water quality; these may all be exacerbated by climate change. Table 4, below, shows the proposed units' names, land ownership of the riparian areas surrounding the units, and approximate river miles. Navigable streambeds in the State of Texas are owned by the State; therefore, the critical habitat units within Texas are on State-owned land. In Kansas, New Mexico, and Oklahoma, the landowners of the adjacent land consist of Federal, Tribal, State, and private landowners that may own the streambed. All proposed units include only the river habitat up to bankfull. The bankfull width is the width of the stream or river at bankfull discharge. Bankfull discharge is the flow at which water begins to leave the active channel and move into the floodplain. It serves to identify the point at which the active channel ceases and the floodplain begins.

TABLE 4—PROPOSED CRITICAL HABITAT UNITS FOR THE PEPPERED CHUB

| Critical habitat unit                    | Occupied at the time of listing | Riparian ownership                    | Length of unit in river miles (kilometers) |
|------------------------------------------|---------------------------------|---------------------------------------|--------------------------------------------|
| Unit 1. Upper South Canadian River ..... | Yes .....                       | Federal; State; Private; Other .....  | 197 (317)                                  |
| Unit 2. Lower South Canadian River ..... | No .....                        | Federal; Tribal; Private; Other ..... | 400 (644)                                  |

TABLE 4—PROPOSED CRITICAL HABITAT UNITS FOR THE PEPPERED CHUB—Continued

| Critical habitat unit                  | Occupied at the time of listing | Riparian ownership                           | Length of unit in river miles (kilometers) |
|----------------------------------------|---------------------------------|----------------------------------------------|--------------------------------------------|
| Unit 3. Arkansas/Ninnescah River ..... | No .....                        | Private; Other .....                         | 179 (288)                                  |
| Unit 4. Cimarron River .....           | No .....                        | Federal; Tribal; State; Private; Other ..... | 292 (470)                                  |
| Total .....                            | .....                           | .....                                        | 1,068 (1,719)                              |

**Note:** Unit lengths may not sum due to rounding.

Unit 1: Upper South Canadian River, New Mexico and Texas

Unit 1 consists of approximately 197.16 river miles (rmi) (317.29 river kilometers (rkm)) comprised of a portion of the South Canadian River originating below the Ute Dam west of Logan, New Mexico, and extending downstream to the delta of Lake Meredith, Texas; and a portion of Revuelto Creek originating at the Interstate Highway 40 bridge extending downstream to the confluence with the South Canadian River, New Mexico. Revuelto Creek is an important source of water and sediment for the Upper South Canadian River and is considered occupied. Unit 1 occurs largely within private land or “other.” Land described as “other” is land with non-Federal ownership that could not be determined, but is likely to be tribal or private. This unit possess those characteristics as described by physical or biological feature 1. Physical or biological features 2 and 3 are in degraded condition in this unit during some times of the year and are dependent upon water releases from Ute Reservoir, precipitation and groundwater; but are currently sufficient to maintain self-sustaining populations. Water management strategies could enhance physical or biological features 2 and 3 within this unit. Current management to address native riparian vegetation is ongoing throughout this unit as it pertains to physical or biological feature 4; however, additional efforts to improve streamflow and channel morphology/complexity could further benefit this species. Predatory and other fish that may compete with peppered chub are present in this unit, but any effect to peppered chub resiliency is unclear. Thus, management actions to achieve physical or biological feature 5 may be necessary if additional information suggests the species’ resiliency is affected by predation or competition. We are requesting public input in an effort to clarify these uncertainties in land ownership using the public comment period and addressed in the Information Requested section above. Approximately 21.45 rmi (34.52 rkm) are publicly owned within

the Lake Meredith National Recreation Area managed by the National Park Service, and approximately 6.14 rmi (9.88 rkm) are managed by the Bureau of Reclamation. In addition, several small segments of public lands occur at bridge crossings, road easements, and the like.

Unit 2: Lower South Canadian River, Texas and Oklahoma

Because we have determined occupied areas are not adequate for the conservation of the species, we have evaluated whether any unoccupied areas are essential for the conservation of the species and identified this area as essential for the conservation of the species. Unit 2 comprises approximately 400.01 rmi (643.86 rkm) consisting of the South Canadian River originating at the U.S. 83 bridge north of Canadian, Texas, and extending downstream to the U.S. 75 bridge northwest of Calvin, Oklahoma. Unit 2 occurs almost entirely within land under “other” land ownership, as described above under Unit 1. Approximately 13.15 rmi (21.16 rkm) is managed by the U.S. Army Corps of Engineers, and approximately 0.75 rmi (1.21 rkm) is held in trust by the Bureau of Indian Affairs as Cheyenne-Arapaho Trust Land. In addition, several small segments of public land occur at bridge crossings, road easements, and the like. Historically, peppered chub was observed in the lower portions of the South Canadian River. Peppered chub were last reported in the South Canadian River resiliency unit in 1999. Currently it supports other pelagic-spawning prairie fish, such as the threatened Arkansas River shiner. This unit has at least one of the physical or biological features essential to the conservation of the species and we are reasonably certain that each will contribute to the conservation of the species. Our specific rationale for this unit can be found below in this unit description.

Although it is considered unoccupied, portions of this unit contain some or all of the physical or biological features essential for the conservation of the

species. Unit 2 possesses those characteristics as described by physical or biological feature 1 and is the longest unfragmented river segment within the historical range of the peppered chub. Although we have determined that peppered chub requires 127 rmi of unobstructed river characterized by a complex braided channel and substrates of predominantly sand, with some patches of silt, gravel, and cobble, that is the minimum number of river miles required adequately facilitate reproduction and maintain a population assuming all of the physical habitat requirements exist throughout the stretch of river (Service 2018, pp. 32 & 116). In order to establish populations, peppered need a longer river length that will not only adequately facilitate reproduction but also population growth (Service 2018, p. 97). Additionally, the required habitat factors (from physical or biological feature 1) do not exist throughout the entire river segment and because the peppered chub has an approximate 2-year life cycle any additional stream length would guard against extirpation due to multi-year droughts.

Physical or biological feature 2 is degraded in the upper portion of unit during some times of the year and is dependent upon precipitation and groundwater. Based on available data (OWRB 2017, pg. 39–43), physical or biological feature 3 is present throughout this unit. Current management to address native riparian vegetation is ongoing throughout this unit as it pertains to physical or biological feature 4; however, these management efforts are not specifically directed at benefiting peppered chubs and additional management efforts may be necessary. Management actions to control non-native phreatophytic vegetation upstream and within the upper portion of this unit could also improve physical or biological feature 2 by reducing evapotranspiration. Predatory and other fish that may compete with peppered chub are present in this unit, but any effect to peppered chub resiliency is unclear. Thus, management actions to achieve

physical or biological feature 5 may be necessary if additional information suggests the species' resiliency is affected by predation or competition.

If this unit were established, it would likely be a moderately to highly resilient population due to longer stream length compared to other units and would increase the species redundancy by one population. This unit is essential for the conservation of the species because it will provide habitat for range expansion in portions of known historical habitat that is necessary to increase viability of the species by increasing its resiliency, redundancy, and representation. A portion (approximately 238.2 rmi (383.3 rkm)) of listed Arkansas River shiner critical habitat is present in Unit 2.

We are reasonably certain that this unit will contribute to the conservation of the species, because the need for conservation efforts is recognized and is being discussed by our conservation partners, and methods for restoring and reintroducing the species into unoccupied habitat are being worked on. The State of Oklahoma has identified the peppered chub as a tier III species of greatest conservation need (moderate level of conservation need) in the Oklahoma Comprehensive Wildlife Conservation Strategy (ODWC 2016, pg. 399). The State strategy was developed to articulate the conservation strategies necessary to conserve their rare and declining wildlife species and maintain Oklahoma's rich biological heritage for present and future generations (ODWC 2016, pg. 3). The strategy identifies several general conservation actions that would improve physical or biological features 2, 3, and 4 and benefit the peppered chub, if a population were established and if the actions were implemented, such as; providing funding to landowners to restore channel morphology, water conservation, coordinating further with the Service and public education (ODWC 2016, pp. 45–46). State and Federal partners have shown interest in propagation and reintroduction efforts for the peppered chub in this area. As previously mentioned, efforts are underway regarding a captive propagation program for peppered chub at the Tishomingo National Fish Hatchery in Oklahoma. The State of Kansas, Tishomingo National Fish Hatchery and the Oklahoma Fish and Wildlife Conservation Office collaborate regularly on conservation actions.

The State of Texas also recognizes the peppered chub as species of greatest conservation need and gives the species a rank of S1 (At very high risk of extirpation in the jurisdiction due to very restricted range, very few

populations or occurrences, very steep declines, severe threats, or other factors). Texas is one of only two states where the species remains extant. The State has also identified the portion of the Canadian River within the boundaries of the State of Texas (where the species exists and areas inside this unit) as an ecologically significant stream because it has threatened and endangered species/unique communities present (Texas Water Development Board (TWDB) 2016, pg. 8–2). The Canadian River segment in the panhandle of Texas is also significant because of the presence of unique, exemplary or unusually extensive natural communities that water development projects would have significant detrimental effects upon (TWDB 2016, pg. 8–2).

#### Unit 3: Arkansas/Ninnescah River, Kansas and Oklahoma

Because we have determined occupied areas are not adequate for the conservation of the species, we have evaluated whether any unoccupied areas are essential for the conservation of the species and identified this area as essential for the conservation of the species. Unit 3 comprises approximately 178.96 rmi (288.02 rkm) consisting of the South Fork Ninnescah River originating at the Highway 54/400 bridge east of Pratt, Kansas, and extending downstream to the River Road Bridge east of Newkirk, Oklahoma. Unit 3 occurs almost entirely on land under "other" land ownership, as described above under Unit 1. A small amount of this unit is publicly owned in the form of bridge crossings, road easements, and the like. Peppered chub was observed in the Ninnescah River in surveys between the year 2000 and 2013. This unit has at least one of the physical or biological features essential to the conservation of the species and we are reasonably certain that each will contribute to the conservation of the species. Our specific rationale for this unit can be found below in this unit description.

Although it is currently considered unoccupied, this unit contains some or all of the physical or biological features necessary for the conservation of the species. Physical or biological feature 1 is in degraded condition in this unit during some times of the year and is dependent on adequate flows. However, if implemented, habitat restoration actions as identified in the Kansas Recovery Plan for the Peppered Chub and the Kansas Wildlife Action Plan would meet the requirements of physical or biological feature 1 (Layer and Brinkman 2005, pg. 16; Rohweder

2015, pp. 52–55). Based on periodic sampling during summer months over a range of three decades, physical or biological features 2 and 3 are consistently present in this unit (KS DWPT, unpublished data 2019). Water management strategies could further enhance physical or biological features 2 and 3. Current management to address native riparian vegetation is ongoing throughout this unit as it pertains to physical or biological feature 4. Management actions to control non-native phreatophytic vegetation upstream and within the upper portion of this unit could also improve physical or biological feature 2 by reducing evapotranspiration. Predatory and other fish that may compete with peppered chub are present in this unit, but any effect to peppered chub resiliency is unclear. Thus, management actions to achieve physical or biological feature 5 may be necessary if additional information suggests the species' resiliency may be affected by predation or competition.

Unit 3 was the most recently occupied of the three unoccupied units. If established, the population would increase redundancy (and guard against catastrophic events) by not only increasing the number of populations but also adding a population that is geographically separate from the Upper South Canadian River population. A population at the extreme north-eastern portion of the historical range also dramatically increases ecological diversity for the peppered chub (representation). This unit is essential for the conservation of the species because it will provide habitat for range expansion in portions of known historical habitat that is necessary to increase viability of the species by increasing its resiliency, redundancy, and representation.

We are reasonably certain that this unit will contribute to the conservation of the species, because the need for conservation efforts has been recognized by our conservation partners, and development of methods for restoring habitats and reintroducing the species into unoccupied habitat are ongoing. The State of Kansas has identified the peppered chub as a tier I species of greatest conservation need in their State Wildlife Action Plan (Rohweder 2015, pg. 55). The State plan was developed to guide KDWPT and conservation partners in the planning and implementation of conservation measures to address priority issues and actions, as identified in the plan, which would improve physical or biological features 1–5 (Rohweder 2015, pg. ii). Both the Service and the State of Kansas

identified the peppered chub as a species that could significantly benefit from propagation efforts (Webb et al., n.d., pg. 7). Habitat restoration, such as removal or modification of fish barriers, has been identified in the Recovery Plan for the Peppered Chub (Layher and Brinkman 2005, pg. 16). As previously mentioned, efforts are underway regarding a captive propagation program for peppered chub at the Kansas Aquatic Biodiversity Center.

#### Unit 4: Cimarron River, Kansas and Oklahoma

Because we have determined occupied areas are not adequate for the conservation of the species, we have evaluated whether any unoccupied areas are essential for the conservation of the species and identified this area as essential for the conservation of the species. Unit 4 comprises approximately 291.82 rmi (469.63 rkm) consisting of the Cimarron River originating at the U.S. 183 bridge east of Englewood, Kansas, and extending downstream to the OK 51 bridge northeast of Oilton, Oklahoma. Unit 4 occurs almost entirely on land under “other” land ownership, as described above under Unit 1.

Approximately 0.86 rmi (1.38 rkm) is managed by the U.S. Army Corps of Engineers, approximately 0.56 rmi (0.91 rkm) is managed by the Bureau of Land Management, and approximately 0.94 rmi (1.51 rkm) is held in trust by the Bureau of Indian Affairs as Sac and Fox Nation Trust Land and Pawnee Trust Land. In addition, small amounts of the unit are publicly owned in the form of bridge crossings, road easements, and the like. Historically, peppered chub was observed in the Cimarron River. The peppered chub was last observed in the Cimarron River resiliency unit in 2011. This unit has at least one of the physical or biological features essential to the conservation of the species and we are reasonably certain that each will contribute to the conservation of the species. Our specific rationale for this unit can be found below in this unit description.

Unit 4 is considered unoccupied; however, portions of this unit contain some or all of the physical or biological features necessary for the conservation of the species. Physical or biological feature 1 is present within this unit, as described in the Unit 2 description. Physical or biological feature 2 is degraded in upstream portions of this unit during some times of the year (absent during elevated drought conditions) and is dependent upon precipitation and groundwater. Based on available data, physical or biological feature 3 is present throughout this unit

with the exception of 3(iii) (conductivity generally less than 16.2 mS/cm) along an approximate 79 mile portion upstream of Waynoka to Ames, Oklahoma. Management actions would likely be necessary to reduce conductivity in this area (OWRB 2017, pg. 49–56). Current management to address native riparian vegetation is ongoing throughout this unit as it pertains to physical or biological feature 4. Management actions to control non-native phreatophytic vegetation upstream and within the upper portion of this unit could also improve physical or biological feature 2 and 3 by reducing evapotranspiration. Predatory and other fish that may compete with peppered chub are present in this unit, but any effect to peppered chub resiliency is unclear. Thus, management actions to achieve physical or biological feature 5 may be necessary if additional information suggests the species’ resiliency is affected by predation or competition.

Peppered chub currently has little to no representation and redundancy. If established, this population would increase redundancy by one population, thereby guarding against catastrophic events, and would increase the species’ ecological diversity (representation). This unit is essential for the conservation of the species because it will provide habitat for range expansion in portions of known historical habitat that is necessary to increase viability of the species by increasing its resiliency, redundancy, and representation. Critical habitat for the Arkansas River shiner is present within a portion (approximately 201.5 rmi (324.30 rkm)) of Unit 4.

We are reasonably certain that this unit will contribute to the conservation of the species because the need for conservation efforts has been recognized and is being discussed by our conservation partners, and methods for restoring and reintroducing the species into unoccupied habitat are ongoing. The State of Oklahoma has identified the peppered chub as a tier III species of greatest conservation need in the Oklahoma Comprehensive Wildlife Conservation Strategy (ODWC 2016, pg. 399). The State strategy was developed to articulate the conservation strategies necessary to conserve their rare and declining wildlife species and maintain Oklahoma’s rich biological heritage for present and future generations (ODWC 2016, pg. 3). The strategy identifies several general conservation actions that would improve physical or biological features 2, 3, and 4 and benefit the peppered chub, if a population were established and if the actions were implemented, such as; providing

funding to landowners to restore channel morphology, water conservation, coordinating further with the Service, public education (ODWC 2016, pp. 45–46). State and Federal partners have shown interest in propagation and reintroduction efforts for the peppered chub. As previously mentioned, efforts are underway regarding a captive propagation program for peppered chub at the Tishomingo National Fish Hatchery in Oklahoma.

It is possible that significant drought conditions in the late 1980s and early 1990s led to the peppered chub decline and eventual extirpation in the Cimarron River (in Unit 4). The current condition of the unit, however, is likely to support populations once again (Service 2018, pg. 150). The shoal chub (*Macrhybopsis hyostoma*), a species in the same genus as the peppered chub, has re-established populations and continues to persist in the Cimarron River after previously experiencing significant declines (Luttrell et al. 1999, pp. 984–985).

#### Effects of Critical Habitat Designation

##### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final regulation with a revised definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the

Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, tribal, local, or private lands that are not federally funded, authorized or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency’s discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated

critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

#### Application of the “Adverse Modification” Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate 7(a)(2) of the Act by destroying or adversely modifying such designation.

Activities that the Services may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Replacement and maintenance of river crossings and bridges;

(2) Construction, replacement, maintenance, or removal of pipelines, or abandonment of pipelines or electrical lines crossing streams;

(3) Park maintenance and authorization of recreational activities by the U.S. National Park Service (e.g., permitting recreational off-road vehicle use at Lake Meredith Recreational Area);

(4) Operation and maintenance of salinity control programs;

(5) Dam maintenance, water releases from dams, and flow management via dams;

(6) Water withdrawals and groundwater withdrawals from reservoirs;

(7) Water development projects (such as new impoundments, diversions, or reservoir projects);

(8) Watershed restoration activities;

(9) Stream restoration and habitat improvement;

(10) Stocking of nonnative fish or native fish that compete with the peppered chub;

(11) Oil and gas exploration and extraction; and

(12) New or expanded development of municipal or agricultural water supplies.

#### Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” There are no Department of Defense (DoD) lands with a completed INRMP within the proposed critical habitat designation.

#### Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face and the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Tribal areas are included in this critical habitat designation. We are



considering these areas for exclusion from critical habitat (see Exclusions, below). However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information we obtain during the comment period and information about the economic impacts of the designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**, above).

#### Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.”

The “without critical habitat” scenario represents the baseline for the analysis, which includes the regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.*, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.*, conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of

inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the peppered chub (Industrial Economics, Incorporated (IEC) 2018). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.*, absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. If there are any unoccupied units in the proposed critical habitat designation, the screening analysis assesses whether any additional management or conservation efforts may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our draft economic analysis of the proposed critical habitat designation for the peppered chub and is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities,

where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the peppered chub, first we identified, in the IEM dated November 2018, probable incremental economic impacts associated with the following categories of activities: (1) Replacement and maintenance of river crossings and bridges (Federal Highway Administration (FHWA)); (2) construction, replacement, maintenance, or removal of pipelines, or abandonment of pipelines or electrical lines crossing streams (Federal Energy Regulatory Commission (FERC) and U.S. Army Corps of Engineers (USACE)); (3) park maintenance and authorization of recreational activities (U.S. National Park Service (NPS)); (4) operation and maintenance of salinity control programs (Bureau of Reclamation (USBR)); (5) helium collection or storage (Bureau of Land Management (BLM)); (6) dam maintenance and water releases (USACE); (7) flow maintenance and water withdrawals (USACE); (8) watershed restoration activities (Natural Resources Conservation Service (NRCS), U.S. Forest Service (USFS), Environmental Protection Agency (EPA), Federal Emergency Management Agency (FEMA), and USACE); (9) stream restoration and habitat improvement (NRCS, USFS, the Service, USACE, EPA, and FEMA); (10) pesticide use (USFS, FERC, and FHWA); (11) fish surveys (Service, USFS, and NPS); (12) emergency response activities (FEMA); (13) oil and gas exploration and extraction (USACE); and (14) future reintroduction efforts (Service, NPS, or USFS). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. If we list the species, in areas where the peppered chub is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the



species. If, when we list the species, we also finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the consultation process.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.*, difference between the jeopardy and adverse modification standards). The following specific circumstances help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm to constitute jeopardy to the peppered chub would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species.

We have identified and delineated four proposed critical habitat units, totaling approximately 1,068 rmi (1,719 rkm), one of which is currently occupied by the peppered chub and three that are unoccupied but essential to the conservation of the species. The occupied unit (Unit 1) is considered occupied year-round for the purposes of consultation based on current survey data. In the occupied area, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the peppered chub. While this additional analysis in the occupied critical habitat would require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

Three of the proposed critical habitat units (Units 2, 3, and 4) are unoccupied. We anticipate the incremental impacts of the critical habitat designation to be higher in the unoccupied areas because there are no baseline conservation efforts to consider in those areas where the species is not present. However, large portions of Unit 2 (approximately 238.2 rmi (383.3 rkm)) and Unit 4 (approximately 201.5 rmi (324.30 rkm)) overlap with the designation of critical

habitat of a similar species (Arkansas River shiner), and, thus, section 7 consultation would already be triggered in segments of these units.

Federal agencies are the entities most likely to incur incremental costs associated with designating critical habitat, due to section 7 requirements. We do not anticipate any costs to State or local agencies, or impacts on property values related to the public's perception of additional regulation, because we do not expect the designation of critical habitat for the peppered chub to result in changes to Kansas, New Mexico, Oklahoma, or Texas local regulations (IEc 2018, p. 16).

No more than 153 peppered chub consultations (148 informal and 5 formal) are anticipated in any given year (IEc 2018, p. 16). Proposed Unit 3 (Arkansas/Ninnescah River) has the highest potential costs, due in part to the fact that there is no overlapping critical habitat designation with the Arkansas River shiner in this unit. However, the estimated incremental costs of the total critical habitat designation for the peppered chub in the first year are unlikely to exceed \$900,000 (2018 dollars) (IEc 2018, p. 16). Thus, the annual administrative burden would not reach \$100 million.

As we stated earlier, we are soliciting data and comments from the public on the DEA and all aspects of the proposed rule and our required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species. During the development of a final designation, we will consider any additional economic impact information we receive through the public comment period, and, as such, areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

#### Consideration of National Security Impacts or Homeland Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. In preparing this proposal, we have determined that the lands adjacent to the proposed designation of critical habitat for peppered chub are not owned or managed by the Department of Defense or Department of Homeland Security. We anticipate no impact on

national security. However, during the development of a final designation we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

#### Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are nonpermitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

Although we have determined that there are currently no active HCPs, CCAAs, SHAs or other management plans for the peppered chub, we are aware of management plans within the peppered chub's range such as the Arkansas River Shiner (*Notropis girardi*) Management Plan for the Canadian River From U.S. Highway 54 at Logan, New Mexico, to Lake Meredith, Texas (Canadian River Municipal Water Authority, June 2005) and the Recovery Plan for the Peppered Chub (*Macrhybopsis tetranema*) Gilbert, IN, Kansas (Kansas Department of Wildlife and Parks, May 2005). We anticipate no impact on current partnerships or permitted conservation plans from this proposed critical habitat designation.

#### Tribal Lands

Several Executive Orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control tribal lands, emphasize the importance of developing partnerships with tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service (NMFS), Secretarial Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: "Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands." In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider exclusions of tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating tribal lands or waters as critical habitat, nor does it state that tribal lands or waters cannot meet the Act's definition of "critical habitat." We are directed by the Act to identify areas that meet the definition of "critical habitat" (*i.e.*, areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority.

Less than 2 miles of tribal lands are included in the proposed designation of critical habitat for the peppered chub. We will consider these areas for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act. The Sac and Fox Nation, Cheyenne and Arapaho Tribes, and the Pawnee are the main tribes that may be affected by this proposed rule. We sent notification letters and asked for feedback in November 2018 to the Sac and Fox Nation, the Cheyenne and Arapahoe Tribes, the Southern Plains Regional

Office of the Bureau of Indian Affairs, and the Southwest Regional Office of the Bureau of Indian Affairs. We received a response from the Sac and Fox Nation in a letter dated November 20, 2018, and they provided us with negative survey data and a discussion of future activities in the area that may or may not be performed under Federal permits. We will continue to coordinate with the Sac and Fox Nation, as well as any other tribal entity who wishes to provide information to the Service regarding this proposed listing and critical habitat designation. A final determination on whether the Secretary will exercise his discretion to exclude any of these areas from critical habitat for the peppered chub will be made when we publish the final rule designating critical habitat. We will take into account public comments and carefully weigh the benefits of exclusion versus inclusion of these areas. We may also consider areas not identified above for exclusion from the final critical habitat designation based on information we receive during the preparation of the final rule (*e.g.*, management plans for additional areas).

Voluntary conservation approaches or plans that could be implemented by private landowners and others with a vested interest as such that the engagement in conservation actions, such as removal of barriers, retaining quality riparian areas or water conservation activities, would result in direct and indirect benefits to the associated habitat for the proposed species. The conservation approaches and plans could include a variety of partners, including state and federal natural resource agencies, non-governmental organizations with emphasis on landscape management, local conservation groups with a strategic conservation focus and academia applied research. We may consider areas covered by any conservation actions or conservation plans (such as the Arkansas River Shiner (*Notropis girardi*) Management Plan for the Canadian River From U.S. Highway 54 at Logan, New Mexico to Lake Merideth, Texas or the Recovery Plan for the Peppered Chub, *Macrhybopsis tetranema* Gilbert, IN Kansas) for potential exclusion from the final critical habitat designation.

#### 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.

#### Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has waived their review regarding their significance determination of this proposed rule.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

#### Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that

describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

Under the RFA, as amended, and as understood in the light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is

our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

#### Executive Order 13771

We do not believe this proposed rule is an E.O. 13771 (“Reducing Regulation and Controlling Regulatory Costs”) (82 FR 9339, February 3, 2017) regulatory action because we believe this rule is not significant under E.O. 12866; however, the Office of Information and Regulatory Affairs has waived their review regarding their E.O. 12866 significance determination of this proposed rule.

#### Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our draft economic analysis, we did not find that the designation of this proposed critical habitat would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

#### Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon

State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement

programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the proposed critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

#### Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for peppered chub in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the peppered chub, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

#### Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and

coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

#### Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of designated critical habitat are presented on maps, and the proposed rule provides several options for the

interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

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)). However, when the range of the species includes States within the Tenth Circuit, such as that of the peppered chub, under the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

#### 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. In a letter dated September 7, 2017, we informed the Tribal leadership of nine (Pueblo of Cochiti, Pueblo of Isleta, Pueblo of Jemez, Pueblo of Tesuque, Pueblo of Zuni, Hopi Tribe, Jicarilla Apache Nation, Mescalero Apache Tribe, and the Navajo Nation) Tribal nations near or within the range of the peppered chub in the State of New Mexico, of our intent to conduct a status assessment for the peppered chub. In a letter sent October 18, 2017, we informed all Tribal entities in the State of Oklahoma of our intent to conduct a status assessment. In a letter dated November 6, 2018, we sought the input of the Sac and Fox Nation and the Cheyenne and Arapaho Tribes of

Oklahoma for their input on the potential economic impact of designating critical habitat for the peppered chub. We received a response from the Sac and Fox Nation providing input for a potential critical habitat designation. We will continue to work with Tribal entities during the development of a final rule for the designation of critical habitat for the peppered chub.

#### References Cited

A complete list of references cited in this proposed rule is available on the internet at <http://www.regulations.gov> and upon request from the Arlington Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Arlington Ecological Services Field Office.

#### 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 set forth below:

#### 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), the List of Endangered and Threatened Wildlife, by adding an entry for “Chub, peppered” in alphabetical order under FISHES to read as follows:

#### § 17.11 Endangered and threatened wildlife.

\* \* \* \* \*

(h) \* \* \*

| Common name               | Scientific name                    | Where listed              | Status | Listing citations and applicable rules                                                           |
|---------------------------|------------------------------------|---------------------------|--------|--------------------------------------------------------------------------------------------------|
| *<br>FISHES               | *                                  | *                         | *      | *                                                                                                |
| *<br>Chub, peppered ..... | *<br><i>Macrhybopsis tetranema</i> | *<br>Wherever found ..... | *<br>E | *<br>[Federal Register citation when published as a final rule]; 50 CFR 17.95(e) <sup>CH</sup> . |
| *                         | *                                  | *                         | *      | *                                                                                                |

■ 3. Amend § 17.95(e) by adding an entry for “Peppered Chub (*Macrhybopsis tetranema*)” in the same alphabetical order as the species appears in the table in § 17.11(h), to read as follows:

#### § 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

(e) *Fishes*.

\* \* \* \* \*

Peppered Chub (*Macrhybopsis tetranema*)

(1) Critical habitat units are depicted for Quay County, New Mexico; Hemphill, Moore, Oldham, and Potter Counties, Texas; Clark, Comanche, Cowley, Kingman, Pratt, Sedgwick, and Sumner Counties, Kansas; and Blaine, Caddo, Canadian, Cleveland, Creek, Custer, Dewey, Ellis, Grady, Harper, Hughes, Kay, Kingfisher, Logan, Major, McClain, Payne, Pontotoc, Pottawatomie, Roger Mills, Seminole,

Woods, and Woodward Counties, Oklahoma, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of peppered chub consist of the following components:

(i) Unobstructed river segments greater than 127 river miles (205 river kilometers) in length that are characterized by a complex braided channel and substrates of predominantly sand, with some patches of silt, gravel, and cobble.

(ii) Flowing water with adequate depths to support all life stages and episodes of elevated discharge to facilitate successful reproduction, channel and floodplain maintenance, and sediment transportation.

(iii) Water of sufficient quality to support survival and reproduction, which includes, but is not limited to, the following conditions:

(A) Water temperatures generally less than 98.2 °F (36.8 °C);

(B) Dissolved oxygen concentrations generally greater than 3.7 parts per million (ppm);

(C) Conductivity generally less than 16.2 microsiemens per centimeter (mS/cm);

(D) pH generally ranging from 5.6 to 9.0; and

(E) Sufficiently low petroleum and other pollutant concentrations such that reproduction and/or growth is not impaired.

(iv) Native riparian vegetation capable of maintaining river water quality, providing a terrestrial prey base, and maintaining a healthy riparian ecosystem.

(v) A level of predatory or competitive, native or nonnative fish present such that peppered chub population's resiliency is not affected.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they

are located existing within the legal boundaries on the effective date of the final rule.

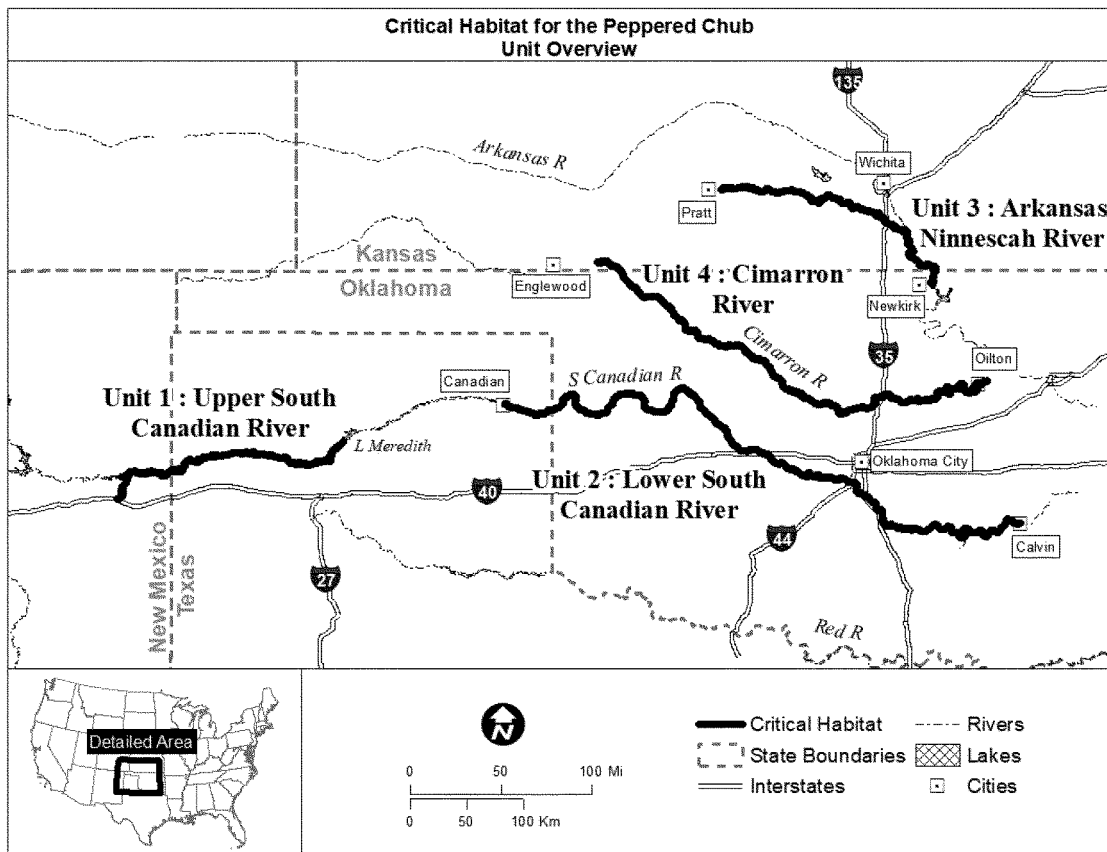
(4) *Critical habitat map units.* Data layers defining map units were created using fish distribution data provided by State agencies and sourced on the FishNet2 online database. Hydrologic data for stream reaches were sourced from the U.S. Geological Survey online

database. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at <https://www.fws.gov/southwest/es/ArlingtonTexas/> and at <http://www.regulations.gov> under Docket No.

Docket No. FWS-R2-ES-2019-0019 and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

BILLING CODE 4333-15-P



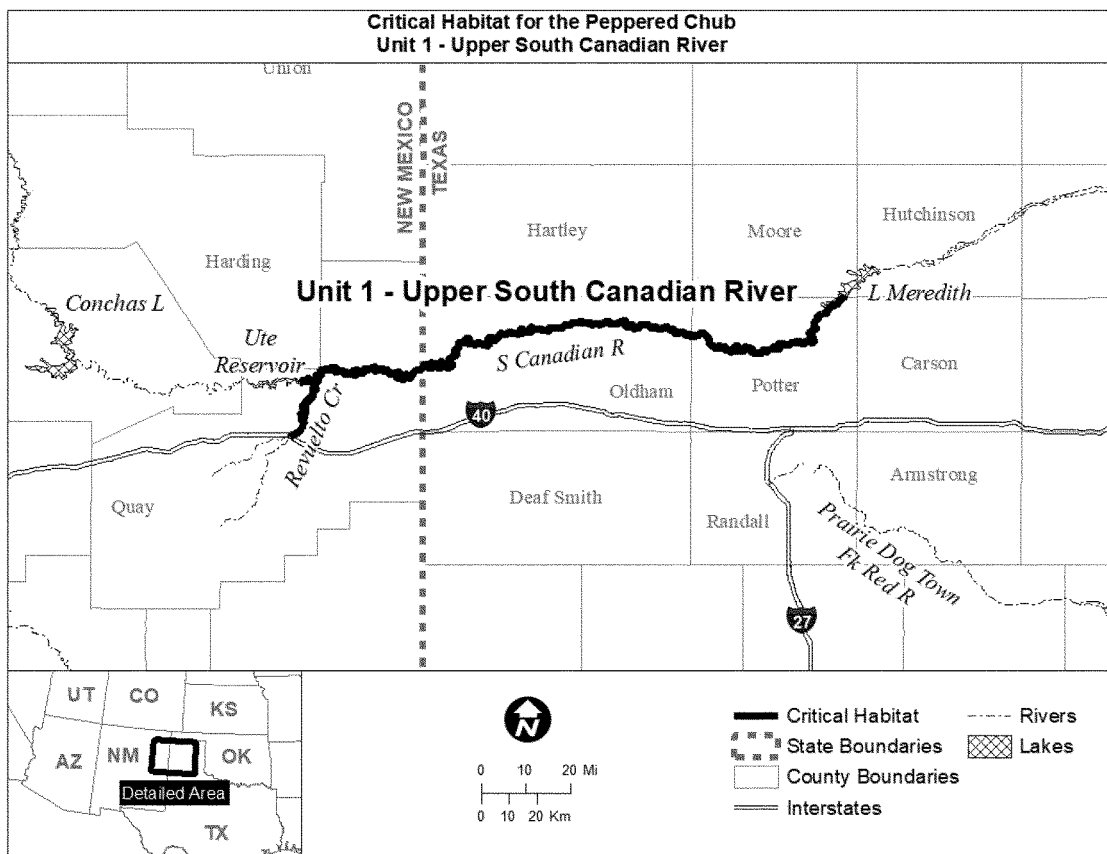
(6) *Unit 1*: Upper South Canadian River, New Mexico and Texas.

(i) This unit consists of approximately 197.16 river miles (317.29 river

kilometers) of occupied habitat in the South Canadian River from Revuelto Creek at Interstate 40 in New Mexico downstream to the inundated portion of

Lake Meredith in Texas. Unit 1 includes river habitat up to bank full height.

(ii) Map of Unit 1 follows:



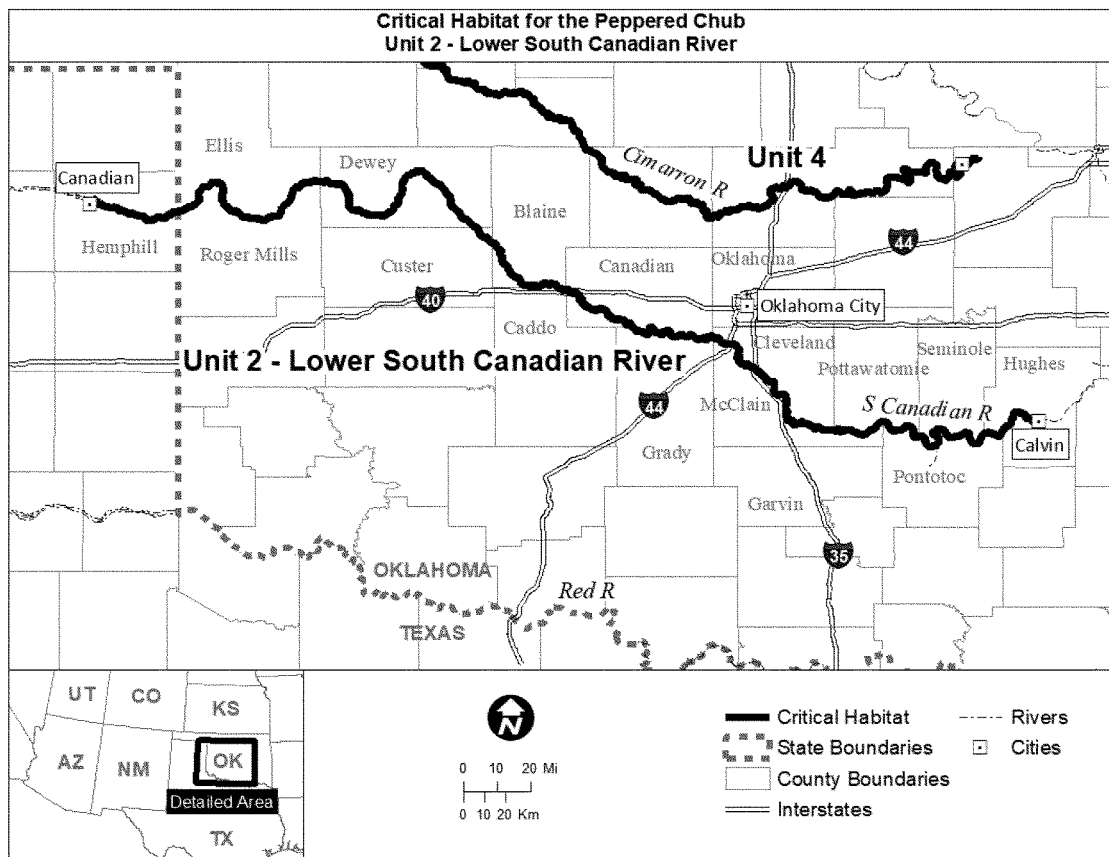
(7) *Unit 2: Lower South Canadian River, Texas and Oklahoma.*

(i) This unit consists of approximately 400.01 river miles (643.86 river

kilometers) of unoccupied habitat in the lower portion of the South Canadian River from the U.S. 83 bridge north of Canadian, Texas, downstream to the

U.S. 75 bridge northwest of Calvin, Oklahoma. Unit 2 includes river habitat up to bank full height.

(ii) Map of Unit 2 follows:





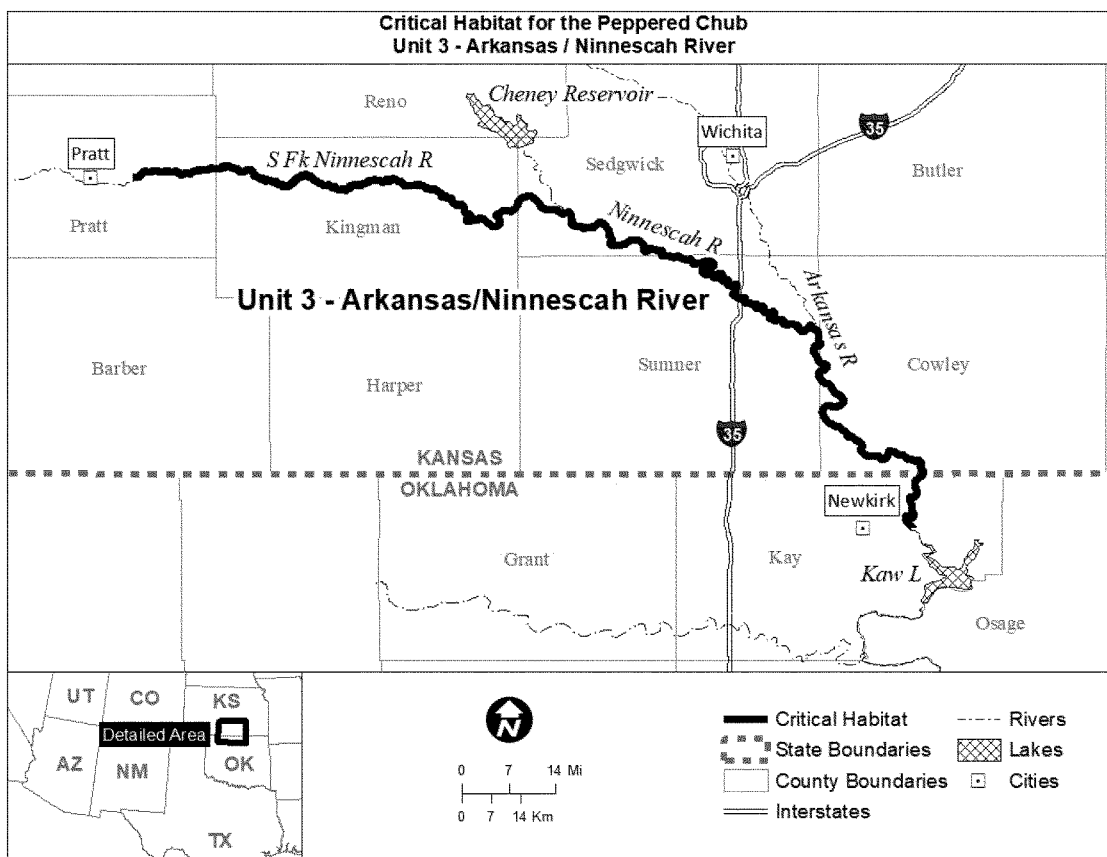
(8) *Unit 3*: Arkansas/Ninnescah River, Kansas and Oklahoma.

(i) Unit 3 consists of approximately 178.96 river miles (288.02 river kilometers) of unoccupied habitat in

portions of the Ninnescah River and the Arkansas River, originating at U.S. 400 bridge east of Pratt, Kansas, and extending downstream to River Road Bridge east of Newkirk, Oklahoma. Unit

3 includes river habitat up to bank full height,

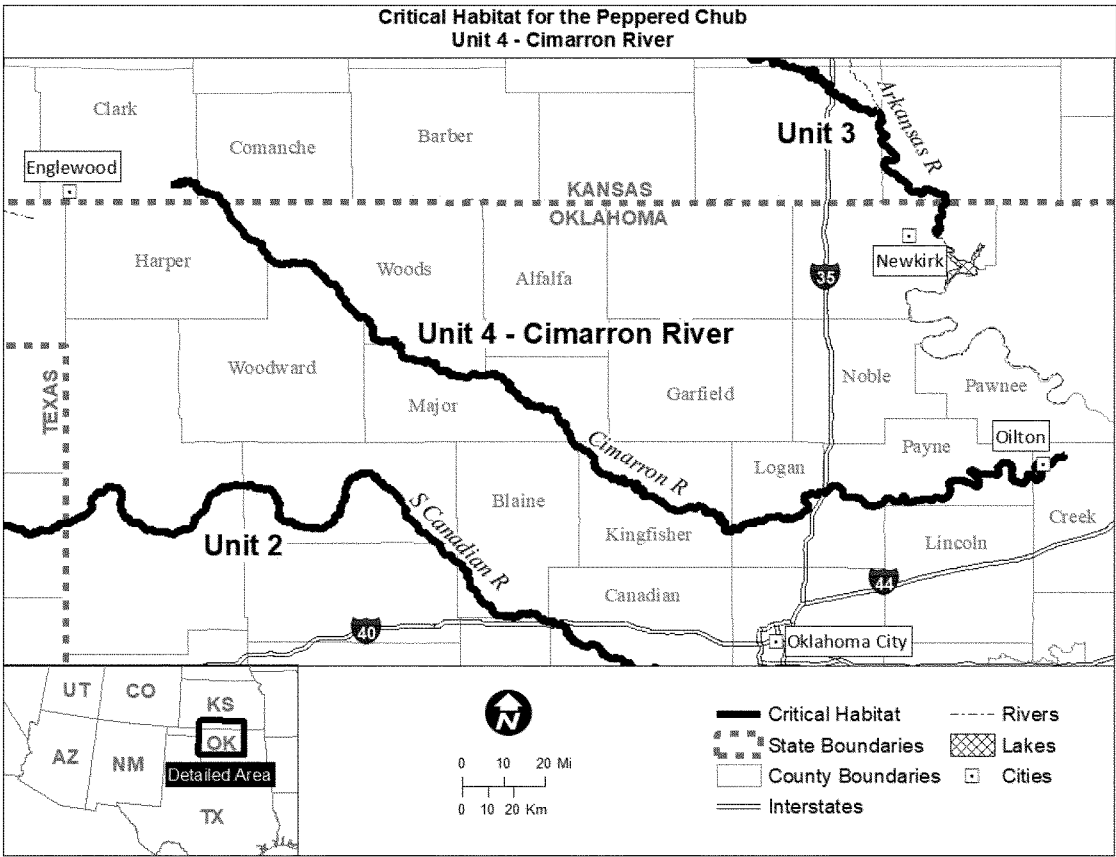
(ii) Map of Unit 3 follows:



- (9) Unit 4: Cimarron River, Kansas and Oklahoma.

(i) This unit consists of approximately 291.82 river miles (469.63 river kilometers) of unoccupied habitat from the U.S. 183 bridge east of Englewood, Kansas, downstream to the OK 51 bridge northeast of Oilton, Oklahoma. Unit 4 includes river habitat up to bank full height.

(ii) Map of Unit 4 follows:



\* \* \* \* \*

Aurelia Skipwith,  
Director, U.S. Fish and Wildlife Service.  
[FR Doc. 2020-25257 Filed 11-30-20; 8:45 am]  
BILLING CODE 4333-15-C

# Notices

Federal Register

Vol. 85, No. 231

Tuesday, December 1, 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.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Notice of Public Meeting of the Assembly of the Administrative Conference of the United States

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Notice.

**SUMMARY:** Pursuant to 5 U.S.C. 595, the Assembly of the Administrative Conference of the United States will meet during a two-day virtual plenary session to consider proposed recommendations, a proposed official statement, and to conduct other business. Written comments may be submitted in advance, and the meeting will be accessible to the public.

**DATES:** The two-day meeting will take place on Wednesday, December 16, 2020, from 10 a.m.–5 p.m.; and Thursday, December 17, 2020, from 10 a.m.–4 p.m. The meeting may adjourn early if all business is finished.

**ADDRESSES:** Due to Centers for Disease Control and Prevention COVID-19 health guidelines, the meeting will be conducted virtually. Information on how to access the meeting will be available on the agency's website prior to the meeting at <https://www.acus.gov/meetings-and-events/plenary-meeting/73rd-plenary-session>.

**FOR FURTHER INFORMATION CONTACT:** Shawne McGibbon, General Counsel (Designated Federal Officer), Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202-480-2088; email [smcgibbon@acus.gov](mailto:smcgibbon@acus.gov).

**SUPPLEMENTARY INFORMATION:** The Administrative Conference of the United States makes recommendations to federal agencies, the President, Congress, and the Judicial Conference of the United States regarding the improvement of administrative

procedures (5 U.S.C. 594). The membership of the Conference, when meeting in plenary session, constitutes the Assembly of the Conference (5 U.S.C. 595).

**Agenda:** The Assembly will receive updates on past, current, and pending Conference initiatives. In addition, pending final action by the Conference's subcommittees and the Council, six proposed recommendations and one proposed official statement are tentatively scheduled for consideration. Summaries of the recommendations and statement appear below:

**Agency Appellate Systems.** This proposed recommendation addresses agencies' appellate review of hearing-level adjudicative decisions. It offers best practices with respect to an agency's identification of the purpose or objective served by its appellate review; its selection of cases for appellate review, when review is not required by statute; its procedures for review; its appellate decision-making processes; its management, administration, and bureaucratic oversight of its appellate systems; and its public disclosure of information about its appellate system.

**Agency Litigation web pages.** This proposed recommendation offers best practices and factors for agencies to consider in deciding whether and how to make litigation filings and relevant court opinions publicly available on their websites. It identifies costs and benefits agencies should weigh when considering whether to post such materials on their websites and suggests steps agencies can take to maximize their accessibility.

**Agency Use of Artificial Intelligence.** This proposed official statement identifies important issues agencies should consider as they develop and use artificial intelligence systems. Among the topics it addresses are transparency, bias, technical capacity building, data collection and use, privacy, and internal and external oversight and evaluation.

**Government Contract Bid Protests Before Agencies.** This proposed recommendation addresses the rules governing the resolution of agency-level procurement contract disputes—commonly called bid protests—under the Federal Acquisition Regulation and agency-specific regulations. It identifies changes agencies can make to current agency-level bid protest procedures to

promote transparency, simplicity, and predictability.

**Protected Materials in Public Rulemaking Dockets.** This proposed recommendation offers best practices for handling personal information and confidential commercial information that agencies determine should be withheld from public rulemaking dockets. It addresses how agencies can best inform members of the public that comments are generally subject to public disclosure and encourage them to review comments for protected material before submission. It also offers best practices for redacting, summarizing, and aggregating comments containing protected material before publishing the comments in public rulemaking dockets.

**Public Availability of Information About Agency Adjudicators.** This proposed recommendation addresses the disclosure of agency policies relating to the selection, appointment, supervision, evaluation, discipline, and removal of adjudicators. It offers agencies best practices for providing plain-language descriptions of such policies and access to relevant legal documents on their websites.

**Rules on Rulemakings.** This proposed recommendation urges agencies to consider adopting rules governing their rulemaking procedures, making such rules publicly available, and soliciting public input on their content. It identifies the subjects that agencies should consider addressing in their rules on rulemakings without prescribing any particular procedures that agencies should include.

Additional information about the proposals and the agenda, as well as any changes or updates to the same, can be found at the 73rd Plenary Session page on the Conference's website prior to the start of the meeting: <https://www.acus.gov/meetings-and-events/plenary-meeting/73rd-plenary-session>.

**Public Participation:** The Conference welcomes the virtual attendance of the public at the meeting, subject to bandwidth limitations. Members of the public who wish to view the meeting are asked to RSVP online at the 73rd Plenary Session web page shown above, no later than two days before the meeting, in order to ensure adequate bandwidth. For anyone who is unable to view the live event, an archived video recording of the meeting will be

available on the Conference's website shortly after the conclusion of the event: <https://livestream.com/ACUS>.

**Written Comments:** Persons who wish to comment on any of the proposed recommendations or official statement may do so by submitting a written statement either online by clicking "Submit a comment" on the 73rd Plenary Session web page shown above or by mail addressed to: December 2020 Plenary Session Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036. Written submissions must be received no later than 10 a.m. (EDT), Monday, December 14, to ensure consideration by the Assembly.

Dated: November 24, 2020.

**Shawne McGibbon,**  
General Counsel.

[FR Doc. 2020-26438 Filed 11-30-20; 8:45 am]

**BILLING CODE 6110-01-P**

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

November 24, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding; 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; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on 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.

Comments regarding this information collection received by December 31, 2020 will be considered. 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](http://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.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

### Animal Plant and Health Inspection Service

**Title:** Export Health Certificate for Animal Products.

**OMB Control Number:** 0579-0256.

**Summary of Collection:** The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture board authority to detect, control, or eradicate pests or diseases of livestock or poultry. The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. To facilitate the export of U.S. animals and products, the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS), Veterinary Services maintains information regarding the import health requirements of other countries for animals and animal products exported from the United States. Many countries that import animal products from the United States require a certification from APHIS that the United States is free of certain diseases. These countries may also require that our certification statement contain additional declarations regarding the U.S. animal products being exported. Regulations pertaining to export certification of animals and animal products are contained in 9 CFR part 91. VS forms 16-4 and VS 16-4A, Export Certificate for Animal Products and Export Certificate for Animal Products Continuation Sheet; a hearing request to appeal VS' decision to refuse to grant a certificate; a notification of tampered certificate; and letterhead certification can be used to meet these requirements.

**Need and Use of the Information:** VS forms 16-4 and 16-4A serve as the official certification that the United States is free of rinderpest, foot-and-mouth disease, classical swine fever, swine vesicular disease, African swine fever, bovine fever, bovine spongiform encephalopathy, and contagious bovine pleuropneumonia. APHIS will collect the exporter's name, address, the name and address of the consignee, the quantity,

and unit of measure, type of product being exported, the exporter's identification, and type of conveyance (ship, train, and truck) that will transport the products. The form also asks for any declarations the receiving country might require such as statements concerning where the product originated and how it was processed. Without the information, many countries would not accept animal products from the United States, creating a serious trade imbalance and adversely affecting U.S. exporters.

**Description of Respondents:** Business or other-for-profit.

**Number of Respondents:** 42,000.

**Frequency of Responses:** Reporting: On occasion.

**Total Burden Hours:** 51,771.

**Ruth Brown,**

Departmental Information Collection Clearance Officer.

[FR Doc. 2020-26391 Filed 11-30-20; 8:45 am]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### Agency Information Collection Activities: Recordkeeping of D-SNAP Benefit Issuance and Commodity Distribution for Disaster Relief

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a revision of a currently approved collection. This information collection addresses the recordkeeping burden associated with forms FNS-292A (*Report of Commodity Distribution for Disaster Relief*) and FNS-292B (*Report of Disaster Supplemental Nutrition Assistance Benefit Issuance*). The reporting burden for these forms, which we are not seeking in this request, are already approved under OMB Control Number: 0584-0594; Expiration Date: 07/31/2023.

**DATES:** Written comments must be received on or before February 1, 2021.

**ADDRESSES:** The Food and Nutrition Services, USDA, invites interested persons to submit written comments.

• Preferred Method: Go to <http://www.regulations.gov>, and follow the online instructions for submitting comments electronically.

- Regarding recordkeeping for form FNS-292A may be sent to Amanda Tucker, Program Analyst, Policy Branch, Food Distribution Division, Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314, U.S. Department of Agriculture, or via email to [Amanda.Tucker@usda.gov](mailto:Amanda.Tucker@usda.gov).

- Regarding recordkeeping for form FNS-292B may be sent to Certification Policy Branch, Program Development Division, Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:**

Requests for additional information or copies of this information collection should be directed to:

Regarding recordkeeping for form FNS-292A may be sent to Amanda Tucker, Program Analyst, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, via email to [Amanda.Tucker@usda.gov](mailto:Amanda.Tucker@usda.gov), or phone 202-720-6051.

Regarding recordkeeping for form FNS-292B may be sent to Certification Policy Branch, Program Development Division, Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314, or via email to [SNAPCBPRules@usda.gov](mailto:SNAPCBPRules@usda.gov).

**SUPPLEMENTARY INFORMATION:**

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Title:* Report of Disaster Supplemental Nutrition Assistance Program Benefit Issuances and Report of Commodity Distribution for Disaster Relief.

*Form Number:* FNS-292A and FNS-292B.

*OMB Number:* 0584-0037.

*Expiration Date:* 2/28/2021.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* This information collection pertains only to the recordkeeping burden associated with forms FNS-292A and FNS-292B. The reporting burden associated with these forms is approved under OMB No. 0584-0594 (Food Program Reporting System; expiration date: 7/31/2023). The Food and Nutrition Service (FNS) utilizes forms FNS-292A and FNS-292B to collect information not otherwise available on the extent of FNS-funded disaster relief operations.

The total number of respondents who could utilize commodities for disaster relief is approximately 190 State agencies and Indian Tribal Organizations administering the Commodity Supplemental Food Program (CSFP), the Emergency Food Assistance Program (TEFAP), the Food Distribution Program on Indian Reservations (FDPIR), or the USDA Foods in Schools program. However, the total number of State agencies potentially using this form in a given year is 108 (55 Food Distribution State agencies for Form FNS-292A; and, 53 State SNAP agencies will maintain the Form FNS-292B).

Form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, is used by State distributing agencies, including Indian Tribal Organizations administering FDPIR or CSFP, to provide a summary report to FNS following termination of disaster commodity assistance and to request replacement of donated foods distributed during the disaster or situation of distress. Donated food distribution in disaster situations is authorized under Section 32 of the Act of August 24, 1935 (7 U.S.C. 612c); Section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431); Section 709 of the Food and Agriculture Act of 1965 (7 U.S.C. 1446a-1); Section 4(a) of the Agriculture and Consumer Protection Act of 1973 (7 U.S.C. 612c note); and by Sections 412 and 413 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5179, 5180). Program implementing regulations are contained in Part 250 of Title 7 of the Code of Federal Regulations (CFR). In accordance with 7 CFR 250.69(f) and 7 CFR 250.70(f), State distributing agencies shall provide a summary report to FNS within 45 days following termination of the disaster assistance, and maintain records of these reports and other information relating to disasters. The number of disasters that will result in a State distributing agency requesting to operate a disaster commodity assistance in a given year is impossible to predict. However, 55 is the maximum number of State

distributing agencies that have ever utilized disaster commodity assistance in a given year. Accordingly, FNS is estimating this burden by assuming that, at maximum, 55 State distributing agency will distribute donated foods during a disaster or situation of distress once per year.

Form FNS-292B, *Report of Disaster Supplemental Nutrition Assistance Benefit Issuance*, is used by 53 State SNAP agencies to report to FNS the number of households and persons certified for Disaster Supplemental Nutrition Assistance Program (D-SNAP) benefits as well as the value of benefits issued. D-SNAP is a separate program from the Supplemental Nutrition Assistance Program (SNAP) and is authorized by Sections 402 and 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) and the temporary emergency provisions contained in Section 5 of the Food and Nutrition Act of 2008, and in 7 CFR part 280 of the SNAP regulations. State agencies may request FNS approval to operate a D-SNAP to address the temporary food needs of certain households in affected areas following a disaster after certain criteria is met. If approved to operate D-SNAP by FNS, a State agency must submit its final FNS-292B to FNS within 45 days of terminating D-SNAP operations, and maintain records of this report. Similarly, the number of disasters that result in a State SNAP agency requesting to operate D-SNAP in a given year is impossible to predict. However, FNS is estimating this burden assuming that, at maximum, each of the 53 State SNAP agencies will request and be approved to operate D-SNAP once per year.

*Affected Public:* State agencies that administer FNS disaster food relief activities.

*Estimated Number of Respondents:* 108 State agencies: 55 Food Distribution State agencies for Form FNS-292A; 53 State SNAP agencies for Form FNS-292B.

*Estimated Number of Responses per Respondent:* 1 recordkeeping response per State distributing agency; 1 recordkeeping responses per State SNAP agency.

*Estimated Total Annual Responses:* 108.

*Estimated Time per Response:* Recordkeeping burden for the State agencies is estimated to be 5 minutes (.0835 hours) per form FNS-292A per State distributing agency respondent, and 5 minutes (.0835 hours) per form FNS-292B per State SNAP agency respondent.

*Estimated Total Annual Burden on Respondents:* Recordkeeping burden for the State agencies is estimated to be 4.59

total annual hours for respondents using FNS–292A, and 4.426 total annual burden estimates for respondents using

FNS–292B, for a combined total of 9.02 total annual burden hours rounded down to 9 total annual burden hours.

| Respondent category    | Type of respondents (optional)          | Instruments                             | Form     | Number of respondents | Frequency of response | Total annual responses | Hours per response | Annual burden (hours) |
|------------------------|-----------------------------------------|-----------------------------------------|----------|-----------------------|-----------------------|------------------------|--------------------|-----------------------|
| State Government ..... | Food Distribution State Agencies Staff. | Commodity Distribution Form FNS–292A.   | FNS–292A | 55                    | 1                     | 55                     | 0.0835             | 4.59                  |
| State Government ..... | SNAP State Agencies Staff.              | D–SNAP Benefit Issuance Form FNS 292–B. | FNS–292B | 53                    | 1                     | 53                     | 0.0835             | 4.426                 |
| Total .....            | .....                                   | .....                                   | .....    | 108                   | 1.000                 | 108                    | 0.084              | 9.02                  |

**Pamilyn Miller,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2020–26375 Filed 11–30–20; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Jefferson National Forest; Monroe County, West Virginia; Giles and Montgomery County, Virginia. Mountain Valley Pipeline and Equitrans Expansion Project Supplemental Environmental Impact Statement**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare a supplemental environmental impact statement; revised.

**SUMMARY:** The USDA, Forest Service (FS) published a notice of intent to prepare a Supplemental Environmental Impact Statement (SEIS) to the 2017 Federal Energy Regulatory Commission (FERC) Final Environmental Impact Statement (FEIS) for the Mountain Valley Pipeline (MVP) and Equitrans Expansion Project in the **Federal Register** on July 30, 2020. The Notice of Intent (NOI) informed the public of the MVP project proposed action: To construct and operate a buried 42-inch natural gas pipeline across approximately 3.5 miles of the Jefferson National Forest (JNF). The NOI identified the FS as the lead agency and the Bureau of Land Management (BLM) as the Federal cooperating agency. A corrected NOI has been prepared to update the responsible official for the FS, to update the applicability of the FS predecisional administrative review process, and to update contacts for both parties.

**DATES:** The Draft SEIS was available on September 25, 2020 and the Final SEIS is anticipated in December, 2020.

**FOR FURTHER INFORMATION CONTACT:** For further information on this project, please contact Ken Arney, the Regional Forester for the Southern Region, by

leaving a voicemail at: 1–888–603–0261. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday. For inquiries for the BLM, contact Victoria Craft, U.S. Bureau of Land Management Realty Specialist, at: (888) 603–0261.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background and History**

The MVP is a proposed 303.5 mile interstate natural gas pipeline that crosses about 3.5 miles of the JNF, in Monroe County, West Virginia and Giles and Montgomery County, Virginia. The FS and the BLM participated as cooperating agencies with the FERC in the preparation of the MVP EIS. On June 29, 2017, the Notice of Availability for the FERC FEIS and the FS Draft Record of Decision (ROD) for the Mountain Valley Project Land and Resource Management Plan Amendment was published in the **Federal Register**.

On December 1, 2017, the FS adopted the FEIS and a ROD was signed by the JNF Forest Supervisor. The ROD amended the JNF Land and Resource Management Plan (Forest Plan) to allow the project to be consistent with the Forest Plan. The ROD included resource protection terms and conditions for the BLM to include should their decision be to grant a right-of-way (ROW). Therefore, both BLM and the FS have overlapping jurisdiction concerning the issuance of the terms and conditions, or stipulations included within the ROW grant.

Under the Mineral Leasing Act (30 U.S.C. 185 *et seq.*) (MLA), the BLM is the Federal agency responsible for issuing ROW grants for natural gas pipeline across Federal lands under the jurisdiction of two or more Federal agencies. The BLM is, therefore, responsible for considering the issuance of a ROW grant for the MVP for pipeline construction and operation across the lands under the jurisdiction of the FS and the United States Army Corps of

Engineers (USACE). In 2017, the BLM received written concurrence to proceed from both Federal agencies and on December 20, 2017 issued a ROD approving the MLA ROW grant to construct and operate the MVP pipeline across Federal lands. The BLM ROD included a temporary use authorization.

Project implementation began in December 2017 and continued until July 27, 2018 when the Fourth Circuit Court of Appeals vacated and remanded the FS's decision approving the JNF plan amendment and BLM's MLA ROW decision. However, the Court vacated the BLM's MLA ROW decision only as it related to the portion through FS lands; the ROW across USACE lands was not affected and that decision remains in place. The Fourth Circuit concluded that aspects of the FS decision failed to comply with the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). The Court upheld the BLM's adoption of and reliance on FERC's FEIS as satisfying the requirements of NEPA in support of the MLA ROW decision across Federal lands. The Court, however, vacated BLM's decision approving the MLA ROW across the JNF, concluding that the BLM did not analyze and determine whether the proposed route utilized rights-of-way in common to the extent practical, as required by the MLA, 30 U.S.C. 185(p).

On May 1, 2020, Mountain Valley Pipeline, LLC (Mountain Valley) submitted a revised MLA ROW application to the BLM seeking to construct and operate the natural gas pipeline across the JNF. Mountain Valley also requested that the FS amend the JNF Forest Plan consistent with the issues identified by the Fourth Circuit Court. On May 28, 2020, the BLM deemed Mountain Valley's revised application complete. For more detailed information on the background and history of the MVP project, see the project website at: <https://www.fs.usda.gov/detail/gwj/>

*landmanagement/projects/  
?cid=stelprd3827827.*

### Purpose and Need for Action

The FS's purpose and need for the proposed action is to respond to a proposal from Mountain Valley to construct and operate a buried 42-inch interstate natural gas pipeline that would cross National Forest Systems (NFS) lands on the JNF along a proposed 3.5-mile corridor. A FS decision is needed because the project would not be consistent with several JNF Forest Plan standards including utility corridors, soil, riparian, old growth, the Appalachian National Scenic Trail (ANST), and scenic integrity without a project-specific amendment. Relatedly, there is a need to determine what terms and conditions, or stipulations should be provided to the BLM in order to protect resources and the public interest consistent with the MLA, 30 U.S.C. 185(h).

For the FS, a supplemental analysis and new decision is needed because the Fourth Circuit Court of Appeals vacated the FS ROD. The Court identified both NFMA and NEPA issues. To resolve the Court's NFMA issues, there is a need, at a minimum, to apply FS Planning Rule requirements to soil and riparian resources and evaluate both the purpose and the effects of the amendment to threatened and endangered aquatic species, consistent with 36 CFR 219.13(b)(5). To ensure all resources potentially affected by the amendment receive equal consideration, there is a need to apply the Planning Rule requirements to resources including water; terrestrial and botanical threatened and endangered species; old growth; the ANST; scenic integrity; and to evaluate the purpose and effect of the amendment.

The Court also identified NEPA deficiencies. There is a need for the FS, at a minimum, to demonstrate that an independent review of the sedimentation analysis has occurred, that predicted effects are supported with rationale, and that previous concerns and comments related to erosion and its effects have been satisfied. To meet this objective, there is a need to evaluate and assess erosion, sedimentation, and water quality effects in relation to anticipated mitigation effectiveness. To address Court issues related to meeting MLA requirements (30 U.S.C. 185(p)), there is a need to analyze and determine whether the proposed route utilizes rights-of-way in common to the extent practicable. Relatedly, the FS needs to re-evaluate the feasibility and practicality of having routes that are not on NFS lands.

There is new information and changed circumstances to consider since the FS ROD was signed in December 2017. New information includes recent federally listed threatened and endangered species and critical habitat designations. Changed circumstances include the status of the project and road use. Over fifty percent of the MVP project has been implemented and stabilization efforts are ongoing; and, the proposal no longer includes the use of the Pocahontas, Mystery Ridge, or Brush Mountain road. Given the new information and changed circumstances, the FS needs to evaluate the sufficiency of the terms and conditions, or stipulations that would be submitted to the BLM.

The BLM's purpose and need for action is to respond to Mountain Valley's revised MLA ROW application for the MVP project to construct and operate a natural gas pipeline across NFS lands consistent with the MLA, 30 U.S.C. 185, and BLM's implementing regulations, 43 CFR part 2880. Under the MLA, the BLM has responsibility for reviewing Mountain Valley's ROW application and authority to issue a decision on whether to approve, approve with modifications, or deny the application.

The BLM's review of the ROW application will focus, in part, on the FS supplemental analysis for NFS lands to make their decision, but also intends to rely on the FERC FEIS, consistent with the Fourth Circuit's decision. The BLM will work as a cooperating agency with the FS to complete the necessary environmental analysis to address the issues identified by the Fourth Circuit.

### Proposed Action

In response to the purpose and need, the FS would provide construction and operation terms and conditions, or stipulations (terms) as needed for the actions listed below. The terms and conditions, or stipulations would be submitted to the BLM for inclusion in the ROW grant. The FS would also provide concurrence to the BLM to proceed with the ROW grant. The operation and maintenance actions that need terms and conditions, or stipulations and FS concurrence include:

- Construction of a 42-inch pipeline across 3.5 miles of the JNF.
- The use of a 125-foot-wide temporary construction ROW for pipeline installation and trench spoil. The width would be reduced to approximately 75 feet to cross most wetlands. Once construction is complete, the MVP would retain a 50-

foot permanent ROW to operate the pipeline.

- The use of above-ground facilities, limited to pipeline markers (*e.g.*, at road and trail crossings) to advise the public of pipeline presence, and cathodic pipeline protection test stations that are required by Department of Transportation.

An integral part of the proposed action is the Plan of Development (POD) that guides pipeline construction, operation, and maintenance. The POD includes resource mitigation for reducing or eliminating impacts to resources. See the FERC FEIS, Sec. 1.5 for a complete list of requirements for the MVP that is managed by the FERC.

### Forest Plan Amendments

Eleven Forest Plan standards on the JNF are proposed to be amended to make the project compliant with the Forest Plan, *i.e.*, allow the BLM to grant a ROW. Standards include: FW-248 (utility corridors); FW-5 (revegetation); FW-8 (soil compaction in water saturated areas); FW-9 (soil impacts from heavy equipment use); FW-13 and FW14 (exposed soil and residual basal area within the channeled ephemeral zone); 11-003 (exposed soil within the riparian corridor); 6C-007 and 6C-026 (tree clearing and utility corridors in the old growth management area); 4A-028 (Appalachian National Scenic Trail and utility corridors); and FW-184 (scenic integrity objectives).

The FS's Planning Rule at 36 CFR 219.13(b)(2) requires responsible officials to provide notice of which substantive requirements of 36 CFR 219.8 through 219.11 are likely to be directly related to the amendment. Whether a Planning Rule provision is directly related to an amendment is determined by any one of the following: The purpose for the amendment, a beneficial effect of the amendment, a substantial adverse effect of the amendment, or a lessening of plan protections by the amendment (36 CFR 219.13(b)(5)). Based on those criteria, the substantive Planning Rule provisions that are likely to be directly related to the amendments are: § 219.8(a)(1) (terrestrial ecosystems); § 219.8(a)(2)(ii) (soils and water productivity); § 219.8(a)(2)(iv) (water resources); § 219.8(a)(3)(i) (ecological integrity of riparian areas); § 219.9(b) (contributions to recovery of threatened and endangered species); § 219.10(a)(3) (utility corridors); § 219.10(b)(1)(vi) (other designated areas); § 219.10(b)(1)(i) (scenic character); and § 219.11(c) (timber harvesting for purposes other than timber production).

## Responsible Officials

For the Forest Service, the responsible official is the Under Secretary, U.S. Department of Agriculture, Natural Resources and the Environment. For the BLM, the responsible official is the Eastern States Director.

## Nature of Decision To Be Made

### Forest Service

Given the purpose and need, the FS responsible official will review the proposed action including the POD, alternatives, the terms and conditions, stipulations, the environmental consequences that would be applicable to NFS lands, public comment, and the project record in order to make the following decisions:

- Whether to approve a Forest Plan amendment that would modify eleven standards in the JNF's Forest Plan;
- Determine what terms and conditions, or stipulations should apply to a BLM ROW grant;
- Whether to issue a written letter of concurrence to BLM if the decision is to assent to the project on NFS lands; and,
- Whether to adopt all or portions of the FERC FEIS that is relevant to NFS lands.

While the Equitrans Expansion project was included in the FERC FEIS, it is not on NFS lands. Therefore, no analysis will be prepared or decision made on that project.

### Bureau of Land Management

Consistent with the MLA, 30 U.S.C. 185, and BLM's implementing regulations, 43 CFR part 2880, the BLM will review Mountain Valley's revised MLA ROW application, the FERC FEIS, and the FS supplemental analysis to determine whether to approve, approve with modifications, or deny the MLA ROW application through the NFS lands. As a cooperating agency, the BLM intends to rely on and adopt the FS supplemental analysis for its decision, as long as the analysis provides sufficient evidence to support the decision and the FS addresses the BLM's comments and suggestions to the BLM's satisfaction. Before issuing a decision on Mountain Valley's application, the BLM would need the FS's written concurrence. Through the concurrence process, if the BLM's decision is to approve the ROW, the FS would submit to the BLM any stipulations for inclusion in the ROW grant that are deemed necessary to protect the environment and otherwise protect the public interest consistent with 30 U.S.C. 185(h); 43 CFR 2885.11. The BLM decision would be documented in a separate ROD.

## Public Engagement Process

Scoping was completed and summarized in the FERC FEIS (FEIS, Section ES-2, 1.4). Written, specific comments, including those that were relevant to NFS lands, identified concerns and issues that were addressed in the FEIS. Scoping will not be repeated and this SEIS will focus on the topics identified by the Fourth Circuit Court and others that are closely related to the Court's findings including:

### JNF Forest Plan Amendment

- The purpose and effects of the Forest Plan amendment on resources including those within the utility corridor; soil; water; riparian; terrestrial; botanical, and aquatic threatened and endangered species; old growth; the ANST, scenic integrity; and,
- How the proposed amendment meets Planning Rule requirements.

### Independent Review of Sedimentation Analysis

- An evaluation and assessment of erosion and sedimentation and its associated effects to water quality and threatened and endangered aquatic species;
- An evaluation of predicted effects in relation to anticipated mitigation effectiveness, supported with rationale; and,
- Disclosure on how previous concerns and comments related to erosion and its effects that were provided to the FERC have been satisfied.

## New Information and Changed Circumstances

There is new information and changed circumstances to consider since the FS ROD was signed in December 2017. New information includes recent federally listed threatened and endangered species and critical habitat designations. Changed circumstances include the status of the project and road use (see Purpose and Need for Action).

Additional opportunities for public comment will be provided when the Draft SEIS is available. A FS decision to amend the Forest Plan will not be subject to either the 36 CFR 218 or 36 CFR 219 pre-decisional administrative review because the responsible official is the Under Secretary of Agriculture, Natural Resources and Environment (36 CFR 218.13(b); 36 CFR 219.13(b)).

### James E. Hubbard,

*Under Secretary, Natural Resources and Environment, U.S. Department of Agriculture.*  
[FR Doc. 2020-26515 Filed 11-30-20; 8:45 am]

**BILLING CODE 3411-15-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Central Montana Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Central Montana 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/hlcnf/workingtogether/advisorycommittees>.

**DATES:** The meeting will be held on December 15, 2020, beginning at 6:00 p.m., Mountain Standard Time.

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 Helena-Lewis and Clark National Forest Supervisor's Office. Please call ahead to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Dave Cunningham, RAC Coordinator, by phone at (406) 791-7754 or via email at [dave.cunningham@usda.gov](mailto:dave.cunningham@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 provisions for Secure Rural Schools RAC to make recommendations on recreation fee proposals and Title II projects;
2. Discuss and make recommendations on recreation fee



proposals for sites located on the Judith, Musselshell, White Sulphur, and Belt Creek Ranger Districts of the Helena-Lewis and Clark National Forest; and

3. Discuss and recommend new Title II projects.

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 December 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 Dave Cunningham, RAC Coordinator, Lewis and Clark Interpretive Center, 4201 Giant Springs Road, Great Falls, Montana 59405; by email to [dave.cunningham@usda.gov](mailto:dave.cunningham@usda.gov), or via facsimile to (406) 453-6157.

**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. 2020-26493 Filed 11-30-20; 8:45 am]

**BILLING CODE 3411-15-P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the South Carolina Advisory Committee

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Notice of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the South Carolina Advisory Committee (Committee) will hold a briefing via web-conference on Wednesday, December 16, 2020, at 12:00 p.m. (EST). The purpose of the briefing is to continue its work and hear from advocates and stakeholders for its project on subminimum wages for people with disabilities.

**DATES:** The meeting will be held on Wednesday, December 16, 2020 at 12:00 p.m. (EST).

**Public Call Information:** Dial: 800-353-6461, conference ID: 8911168.

**FOR FURTHER INFORMATION CONTACT:**

Barbara Delaviez at [bdelaviez@usccr.gov](mailto:bdelaviez@usccr.gov) or (202) 539-8246.

**SUPPLEMENTARY INFORMATION:** Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference operator will ask callers to identify themselves, the organizations they are affiliated with (if any), and an email address prior to placing callers into the conference call. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-977-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Carolyn Allen at [callen@usccr.gov](mailto:callen@usccr.gov) in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Program Unit Office at (202) 539-8246.

Records generated from this meeting may be inspected and reproduced at the Regional Program Unit, as they become available, both before and after the meeting. Records of the meeting will be available via <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzmpAAQ> under the Commission on Civil Rights, South Carolina Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Program Unit at the above email or phone number.

#### Agenda

1. Roll Call
2. Briefing
3. Planning

4. Open Comment
5. Next Steps
6. Adjourn

Dated: November 24, 2020.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2020-26428 Filed 11-30-20; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the West Virginia Advisory Committee

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that planning meetings of the West Virginia Advisory Committee to the Commission will convene by conference call at 11:30 a.m. (ET) on the following dates: Tuesday, December 1, 2020, Tuesday, January 5, 2021, Tuesday, February 2, 2021, Tuesday, March 2, 2021, Tuesday, April 6, 2021, and Tuesday, May 4, 2021.

The purpose of each meeting is to discuss and make decisions about the Committee's civil rights project examining the civil rights impacts of disparate school discipline policies and practices on students of color, students with disabilities and students who identify or are perceived to be LGBTQ+.

**Public Call-In Information:**

Conference call-in number: 1-800-367-2403 and conference call ID number: 7966318.

**FOR FURTHER INFORMATION CONTACT:** Ivy Davis or Corrine Sanders at [ero@usccr.gov](mailto:ero@usccr.gov) or by phone at 202-376-7533.

**SUPPLEMENTARY INFORMATION:** Interested members of the public may listen to each planning meeting discussion by calling the following toll-free conference call-in number: 1-800-367-2403 and conference call ID number: 7966318. Please be advised that before being placed into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Individual who is deaf, deafblind and hard of hearing may also follow the

discussion by first calling the Federal Relay Service at 1-888-364-3109 and providing the operator with the toll-free conference call-in number: 1-800-367-2403 and conference call ID number: 2629531.

Members of the public are invited to make statements during the Public Comments section of the Agenda. They are also invited to submit written comments, which must be received in the regional office approximately 30 days after the scheduled meeting. Written comments may be emailed to the Eastern Regional Office, U.S. Commission on Civil Rights, to Corrine Sanders at [ero@usccr.gov](mailto:ero@usccr.gov). Persons who desire additional information may contact the Eastern Regional Office at (202) 376-7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at: <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzmCAAQ>; click the "Meeting Details" and "Documents" links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, [www.usccr.gov](http://www.usccr.gov), or to contact the Eastern Regional Office at the above phone number, email or street address.

**Agenda:** For each scheduled planning meeting, on the first Tuesday of each of the listed months starting at 11:30 a.m. (ET) is:

- I. Rollcall
- II. Welcome
- III. Project Planning
- IV. Other Business
- V. Next Meeting
- VI. Open Comments
- VII. Adjourn

Dated: November 24, 2020.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2020-26429 Filed 11-30-20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Economic Development Administration

#### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Form ED-209, Revolving Loan Fund Financial Report

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 August 21, 2020 (85 FR 51677) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

**Agency:** Economic Development Administration (EDA), Department of Commerce.

**Title:** Revolving Loan Fund (RLF) Financial Report.

**OMB Control Number:** 0610-0095.

**Form Number(s):** ED-209.

**Type of Request:** Extension of a currently approved information collection.

**Number of Respondents:** 1,700.

**Average Hours per Response:** 3 hours.

**Burden Hours:** 5,100 hours.

**Needs and Uses:** The EDA Revolving Loan Fund (RLF) Program, authorized under section 209 of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3149), has served as an important pillar of EDA investment programs since the establishment of the RLF Program in 1975. The purpose of the RLF Program is to provide regions with a flexible and continuing source of capital, to be used with other economic development tools, for creating and retaining jobs and inducing private investment that will contribute to long-term economic stability and growth. EDA provides RLF grants to eligible recipients, which include State and local governments, Indian Tribes, and non-profit organizations, to operate a lending program that offers loans with flexible repayment terms, primarily to small businesses in distressed communities that are unable to obtain traditional bank financing. These loans enable small businesses to expand and lead to new employment opportunities that pay competitive wages and benefits.

RLF recipients must submit to EDA Form ED-209, RLF Financial Report, which collects limited performance information that EDA uses to oversee and monitor RLF grants (13 CFR 307.14(a)). EDA currently requires Form ED-209 to be submitted on an annual basis for high-performing RLFs and on a semi-annual basis for other RLFs.

EDA recently awarded numerous new RLF grants. This has increased the estimated number of respondents that will be required to submit Form ED-209 and the estimated number of burden hours associated with Form ED-209. On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136), appropriating \$1,500,000,000 in supplemental funds to EDA to "prevent, prepare for, and respond to coronavirus . . . including for necessary expenses for responding to economic injury as a result of coronavirus." EDA used a significant portion of those funds to fund RLF grants. As a result, the number of respondents required to submit Form ED-209 will increase substantially. Although Form ED-209 is being extended without change, and the estimated amount of time required to complete Form ED-209 remains unchanged at three hours, the estimated annual burden hours for Form ED-209 is increasing because of the increased number of RLF grants and respondents required to complete Form ED-209.

**Affected Public:** EDA RLF grant recipients: State and local governments, Indian Tribes, and non-profit organizations.

**Frequency:** Semi-annual and Annual.

**Respondent's Obligation:** Mandatory.

This information collection request may be viewed at [reginfo.gov](http://reginfo.gov). Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice on the following website [www.reginfo.gov/public/do/PRAMain](http://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 0610-0095.

**Sheleen Dumas,**

*Departmental PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2020-26484 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-34-P**

## DEPARTMENT OF COMMERCE

### First Responder Network Authority

#### Combined Board and Board Committees Meeting

**AGENCY:** First Responder Network Authority (FirstNet Authority), National

Telecommunications and Information Administration (NTIA), Department of Commerce.

**ACTION:** Announcement of meeting.

**SUMMARY:** The FirstNet Authority Board will convene an open public meeting of the Board and Board Committees.

**DATES:** December 9, 2020; 11:00 a.m. to 1:00 p.m. Eastern Standard Time (EST); WebEx.

**ADDRESSES:** The public meeting will be conducted via WebEx. Members of the public may listen to the meeting and view the slide presentation by visiting the URL: <https://stream2.sparkstreetdigital.com/20201209-firstnet.html?id=20201209-firstnet>. WebEx information can also be found on the FirstNet website (FirstNet.gov).

**FOR FURTHER INFORMATION CONTACT:**

For General Information: Janell Smith, (202) 257-5929, [Janell.Smith@FirstNet.gov](mailto:Janell.Smith@FirstNet.gov).

For Media Inquiries: Ryan Oremland, (571) 665-6186, [Ryan.Oremland@FirstNet.gov](mailto:Ryan.Oremland@FirstNet.gov).

**SUPPLEMENTARY INFORMATION:**

**Background:** The Middle Class Tax Relief and Job Creation Act of 2012 (codified at 47 U.S.C. 1401 *et seq.*) (Act) established the FirstNet Authority as an independent Authority within NTIA. The Act directs the FirstNet Authority to ensure the building, deployment, and operation of a nationwide Interoperable Public Safety Broadband Network. The FirstNet Authority Board is responsible for making strategic decisions regarding the FirstNet Authority's operations.

**Matters to be Considered:** The FirstNet Authority will post a detailed agenda for the Combined Board and Board Committees Meeting on [FirstNet.gov](http://FirstNet.gov) prior to the meeting. The agenda topics are subject to change. Please note that the subjects discussed by the Board and Board Committees may involve commercial or financial information that is privileged or confidential, or other legal matters affecting the FirstNet Authority. As such, the Board may, by majority vote, close the meeting only for the time necessary to preserve the confidentiality of such information, pursuant to 47 U.S.C. 1424(e)(2).

**Other Information:** The Combined Board and Board Committees Meeting is accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, are asked to notify Janell Smith at (202) 257-5929 or email: [Janell.Smith@FirstNet.gov](mailto:Janell.Smith@FirstNet.gov) at least five (5) business days (December 2) before the meeting.

**Records:** The FirstNet Authority maintains records of all Board proceedings. Minutes of the Combined Board and Board Committees Meeting will be available on [FirstNet.gov](http://FirstNet.gov).

Dated: November 24, 2020.

**Janell Smith,**

*Board Secretary, First Responder Network Authority.*

[FR Doc. 2020-26421 Filed 11-30-20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[B-48-2020]

#### Foreign-Trade Zone (FTZ) 201—Holyoke, Massachusetts, Authorization of Production Activity, ProAmpac Holdings, Inc. (Flexible Packaging Applications), Westfield, Massachusetts

On July 27, 2020, ProAmpac Holdings, Inc., submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 201D, in Westfield, Massachusetts.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (85 FR 47166, August 4, 2020). On November 24, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: November 24, 2020.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2020-26498 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

#### Order Renewing Order Temporarily Denying Export Privileges

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

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

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

Street, Al Rigga, Dubai, United Arab Emirates;

Kerman Aviation a/k/a GIE Kerman Aviation, 42 Avenue Montaigne 75008, Paris, France  
Sirjanco Trading LLC, P.O. Box 8709, Dubai, United Arab Emirates

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

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

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

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

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

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

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

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR parts 730-774 (2020) ("EAR" or "the Regulations"), I hereby grant the request of the Office of Export Enforcement ("OEE") to renew the temporary denial order issued in this matter on May 29, 2020. I find that renewal of this order, as modified, is necessary in the public interest to prevent an imminent violation of the Regulations.<sup>1</sup>

<sup>1</sup> The Regulations, currently codified at 15 CFR parts 730-774 (2020), originally issued pursuant to the Export Administration Act (50 U.S.C. 4601-4623 (Supp. III 2015)) ("EAA"), which lapsed on August 21, 2001. The President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended by successive Presidential Notices, continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) ("IEEPA"). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801-4852 ("ECRA"). While

## I. Procedural History

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

This temporary denial order (“TDO”) was renewed in accordance with Section 766.24(d) of the Regulations.<sup>2</sup> Subsequent renewals also have issued pursuant to Section 766.24(d), including most recently on May 29, 2020.<sup>3</sup> Some

Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA’s date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, Section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders.

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

<sup>3</sup> The May 29, 2020 renewal order was effective upon issuance and published in the **Federal Register** on June 4, 2020 (85 FR 34,405). Prior renewal orders issued on September 17, 2008, March 16, 2009, September 11, 2009, March 9,

of the renewal orders and the modification orders that have issued between renewals have added certain parties as respondents or as related persons, or effected the removal of certain parties.<sup>4</sup>

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

2010, September 3, 2010, February 25, 2011, August 24, 2011, February 15, 2012, August 9, 2012, February 4, 2013, July 31, 2013, January 24, 2014, July 22, 2014, January 16, 2015, July 13, 2015, January 7, 2016, July 7, 2016, December 30, 2016, June 27, 2017, December 20, 2017, June 14, 2018, December 11, 2018, June 5, 2019, and May 29, 2020, respectively. The August 24, 2011 renewal followed the issuance of a modification order that issued on July 1, 2011, to add Zarand Aviation as a respondent. The July 13, 2015 renewal followed a modification order that issued May 21, 2015, and added Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. Each of the renewal orders and each of the modification orders referenced in this footnote or elsewhere in this order has been published in the **Federal Register**.

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

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

<sup>6</sup> *See* note 4, *supra*, concerning the addition of related persons to a temporary denial order. Kosarian Fard and Mahmoud Amini remain parties to the TDO. On August 13, 2014, BIS and Gatewick resolved administrative charges against Gatewick, including a charge for acting contrary to the terms of a BIS denial order (15 CFR 764.2(k)). In addition to the payment of a civil penalty, the settlement includes a seven-year denial order. The first two years of the denial period were active, with the remaining five years suspended conditioned upon Gatewick’s full and timely payment of the civil penalty and its compliance with the Regulations during the seven-year denial order period. This denial order, in effect, superseded the TDO as to Gatewick, which was not included as part of the January 16, 2015 renewal order. The Gatewick LLC Final Order was published in the **Federal Register** on August 20, 2014. *See* 79 FR 49,283 (Aug. 20, 2014).

respondent in order to prevent an imminent violation.<sup>7</sup>

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

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

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

The December 11, 2018 renewal order continued the denial of the export privileges of Mahan Airways, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrani, Al Naser Airlines, Ali Abdullah Alhay, Bahar Safwa General Trading, Sky Blue Bird Group, and Issam Shammout.

On October 28, 2020, BIS, through OEE, submitted a written request for

<sup>7</sup> Zarand Aviation’s export privileges remained denied until July 22, 2014, when it was not included as part of the renewal order issued on that date.

<sup>8</sup> The U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) designated Sky Blue Bird and Issam Shammout as Specially Designated Global Terrorists (“SDGTs”) on May 21, 2015, pursuant to Executive Order 13224, for “providing support to Iran’s Mahan Air.” *See* 80 FR 30,762 (May 29, 2015).

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

renewal of the TDO that issued on May 29, 2020. The written request was made more than 20 days before the TDO's scheduled expiration. Notice of the renewal request was provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received. Furthermore, no appeal of the related person determinations made as part of the September 3, 2010, February 25, 2011, August 24, 2011, April 9, 2012, February 4, 2013, and July 13, 2015 renewal or modification orders has been made by Kosarian Fard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, or Issam Shammout.<sup>10</sup>

## II. Renewal of the TDO

### A. Legal Standard

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

### B. The TDO and BIS's Requests for Renewal

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO, and the renewal and modification orders subsequently issued in this matter, including the May 21, 2015 modification order and the renewal order issued on December 2,

2019, and the evidence developed over the course of this investigation, which indicate a blatant disregard of U.S. export controls and the TDO. The initial TDO was issued as a result of evidence that showed that Mahan Airways and other parties engaged in conduct prohibited by the EAR by knowingly re-exporting to Iran three U.S.-origin aircraft, specifically Boeing 747s ("Aircraft 1–3"), items subject to the EAR and classified under Export Control Classification Number ("ECCN") 9A991.b, without the required U.S. Government authorization. Further evidence submitted by BIS indicated that Mahan Airways was involved in the attempted re-export of three additional U.S.-origin Boeing 747s ("Aircraft 4–6") to Iran.

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

The March 9, 2010 renewal order also noted that a court in the United Kingdom ("U.K.") had found Mahan Airways in contempt of court on February 1, 2010, for failing to comply with that court's December 21, 2009 and January 12, 2010 orders compelling Mahan Airways to remove the Boeing 747s from Iran and ground them in the Netherlands. Mahan Airways and the Balli Group Respondents had been litigating before the U.K. court concerning ownership and control of

Aircraft 1–3. In a letter to the U.K. court dated January 12, 2010, Mahan Airways' Chairman indicated, *inter alia*, that Mahan Airways opposes U.S. Government actions against Iran, that it continued to operate the aircraft on its routes in and out of Tehran (and had 158,000 "forward bookings" for these aircraft), and that it wished to continue to do so and would pay damages if required by that court, rather than ground the aircraft.

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

Moreover, in a January 24, 2011 filing in the U.K. court, Mahan Airways asserted that Aircraft 1–3 were not being used, but stated in pertinent part that the aircraft were being maintained in Iran especially "in an airworthy condition" and that, depending on the outcome of its U.K. court appeal, the aircraft "could immediately go back into service . . . on international routes into and out of Iran." Mahan Airways' January 24, 2011 submission to U.K. Court of Appeal, at p. 25, ¶¶ 108, 110. This clearly stated intent, both on its own and in conjunction with Mahan Airways' prior misconduct and statements, demonstrated the need to renew the TDO in order to prevent imminent future violations. Two of these three 747s subsequently were removed from Iran and are no longer in Mahan Airways' possession. The third of these 747s remained in Iran under Mahan's control. Pursuant to Executive Order 13224, it was designated a Specially Designated Global Terrorist ("SDGT") by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") on September 19, 2012.<sup>13</sup> Furthermore, as discussed in the

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

<sup>11</sup> Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

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

<sup>13</sup> See <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx>.

February 4, 2013 Order, open source information indicated that this 747, painted in the livery and logo of Mahan Airways, had been flown between Iran and Syria, and was suspected of ferrying weapons and/or other equipment to the Syrian Government from Iran's Islamic Revolutionary Guard Corps.

In addition, as first detailed in the July 1, 2011 and August 24, 2011 orders, and discussed in subsequent renewal orders in this matter, Mahan Airways also continued to evade U.S. export control laws by operating two Airbus A310 aircraft, bearing Mahan Airways' livery and logo, on flights into and out of Iran.<sup>14</sup> At the time of the July 1, 2011 and August 24, 2011 orders, these Airbus A310s were registered in France, with tail numbers F-OJHH and F-OJHI, respectively.<sup>15</sup> The August 2012 renewal order also found that Mahan Airways had acquired another Airbus A310 aircraft subject to the Regulations, with MSN 499 and Iranian tail number EP-VIP, in violation of the Regulations.<sup>16</sup> On September 19, 2012, all three Airbus A310 aircraft (tail numbers F-OJHH, F-OJHI, and EP-VIP) were designated as SDGTs.<sup>17</sup>

The February 4, 2013 renewal order laid out further evidence of continued and additional efforts by Mahan Airways and other persons acting in concert with Mahan, including Kral Aviation and another Turkish company, to procure U.S.-origin engines—two GE CF6-50C2 engines, with MSNs 517621 and 517738, respectively—and other aircraft parts in violation of the TDO and the Regulations.<sup>18</sup> The February 4,

2013 order also added Mehdi Bahrami as a related person in accordance with Section 766.23 of the Regulations. Bahrami, a Mahan Vice-President and the head of Mahan's Istanbul Office, also was involved in Mahan's acquisition of the original three Boeing 747s (Aircraft 1-3) that resulted in the original TDO, and has had a business relationship with Mahan dating back to 1997.

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

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

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

On December 31, 2013, Kral Aviation was added to BIS's Entity List, Supplement No. 4 to Part 744 of the Regulations. See 78 FR 75,458 (Dec. 12, 2013). Companies and individuals are added to the Entity List for engaging in activities contrary to the national security or foreign policy interests of the United States. See 15 CFR 744.11.

exclusively reflect the wills and demands of Mahan[.]”<sup>19</sup>

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

The July 22, 2014 renewal order discussed open source evidence from the March-June 2014 time period regarding two BAE regional jets, items subject to the Regulations, that were painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP-MOI and EP-MOK, respectively.<sup>20</sup> In addition, aviation industry resources indicated that these aircraft were obtained by Mahan Airways in late November 2013 and June 2014, from Ukrainian Mediterranean Airline, a Ukrainian airline that was added to BIS's Entity List (Supplement No. 4 to Part 744 of the Regulations) on August 15, 2011, for acting contrary to the national security and foreign policy interests of the United States.<sup>21</sup> Open source

<sup>19</sup> Pioneer Logistics, Gulnihal Yegane, and Kosol Surinanda also were added to the Entity List on December 12, 2013. See 78 FR 75,458 (Dec. 12, 2013).

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

<sup>21</sup> See 76 FR 50,407 (Aug. 15, 2011). The July 22, 2014 renewal order also referenced two Airbus A320 aircraft painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP-MMK and EP-MML, respectively. OEE's investigation also showed that Mahan obtained these aircraft in November 2013, from Khors Air Company, another Ukrainian airline that, like Ukrainian Mediterranean Airlines, was added to BIS's Entity List on August 15, 2011. Open source evidence indicates the two Airbus A320 aircraft may have been transferred by Mahan Airways to another Iranian airline in October 2014,

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

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

<sup>16</sup> See note 14, *supra*.

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

<sup>18</sup> Kral Aviation was referenced in the February 4, 2013 renewal order as "Turkish Company No. 1." Kral Aviation purchased a GE CF6-50C2 aircraft

information indicated that at least EP-MOI remained active in Mahan's fleet, and that the aircraft was being operated on multiple flights in July 2014.

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

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

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

The May 21, 2015 modification order detailed the acquisition of two aircraft, specifically an Airbus A340 bearing

and issued Iranian tail numbers EP-APE and EP-APF, respectively.

<sup>22</sup> See <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140829.aspx>. See 79 FR 55,073 (Sep. 15, 2014). OFAC also blocked the property and property interests of Pioneer Logistics of Turkey on August 29, 2014. *Id.* Mahan Airways' use of Pioneer Logistics in an effort to evade the TDO and the Regulations was discussed in a prior renewal order, as summarized, *supra*, at 14. BIS added both Asian Aviation Logistics and Pioneer Logistics to the Entity List on December 12, 2013. See 78 FR 75,458 (Dec. 12, 2013).

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

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

The July 13, 2015 renewal order outlined evidence showing that Al Naser Airlines' attempts to acquire aircraft on behalf of Mahan Airways extended beyond MSNs 164 and 550 to include a total of nine aircraft.<sup>26</sup> Four of

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

<sup>24</sup> The evidence obtained by OEE showed Ali Abdullah Alhay as a 25% owner of Al Naser Airlines.

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

<sup>26</sup> This evidence included a press release dated May 9, 2015, that appeared on Mahan Airways' website and stated that Mahan "added 9 modern aircraft to its air fleet [.] and that the newly acquired aircraft included eight Airbus A340s and

the aircraft, all of which are subject to the Regulations and were obtained by Mahan from Al Naser Airlines, had been issued the following Iranian tail numbers: EP-MMD (MSN 164), EP-MMG (MSN 383), EP-MMH (MSN 391) and EP-MMR (MSN 416), respectively.<sup>27</sup> Publicly available flight tracking information provided evidence that at the time of the July 13, 2015 renewal, both EP-MMH and EP-MMR were being actively flown on routes into and out of Iran in violation of the Regulations.<sup>28</sup>

The January 7, 2016 renewal order discussed evidence that Mahan Airways had begun actively flying EP-MMD on international routes into and out of Iran. Additionally, the January 7, 2016 order described publicly available aviation database and flight tracking information indicating that Mahan Airways continued efforts to acquire Iranian tail numbers and press into active service under Mahan's livery and logo at least two more of the Airbus A340 aircraft it had obtained from or through Al Naser Airlines: EP-MME (MSN 371) and EP-MMF (MSN 376), respectively.

The July 7, 2016 renewal order described Mahan Airways' acquisition of a BAE Avro RJ-85 aircraft (MSN 2392) in violation of the Regulations and its subsequent registration under Iranian tail number EP-MOR.<sup>29</sup> This

one Airbus A321. See <http://www.mahan.aero/en/mahan-air/press-room/44>. The press release was subsequently removed from Mahan Airways' website. Publicly available aviation databases similarly showed that Mahan had obtained nine additional aircraft from Al Naser Airlines in May 2015, including MSNs 164 and 550. As also discussed in the July 13, 2015 renewal order, Sky Blue Bird Group, via Issam Shammout, was actively involved in Al Naser Airlines' acquisition of MSNs 164 and 550, and the attempted acquisition of MSNs 82 and 99 (which were detained by OEE).

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

<sup>28</sup> There is some publicly available information indicating that the aircraft Mahan Airways is flying under Iranian tail number EP-MMR is now MSN 615, rather than MSN 416. Both aircraft are Airbus A340 aircraft that Mahan acquired from Al Naser Airlines in violation of the Regulations. Moreover, both aircraft were designated as SDGTs by OFAC on May 21, 2015, pursuant to Executive Order 13224. See 80 FR 30,762 (May 29, 2015).

<sup>29</sup> The BAE Avro RJ-85 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The BAE Avro RJ-85 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the EAR regardless of its location. The aircraft is classified

Continued



information was corroborated by publicly available information on the website of Iran's civil aviation authority. The July 7, 2016 order also outlined Mahan's continued operation of EP-MMF in violation of the Regulations on routes from Tehran, Iran to Beijing, China and Shanghai, China, respectively.

The December 30, 2016 renewal order outlined Mahan's continued operation of multiple Airbus aircraft, including EP-MMD (MSN 164), EP-MMF (MSN 376), and EP-MMH (MSN 391), which were acquired from or through Al Naser Airlines, as previously detailed in pertinent part in the July 13, 2015 and January 7, 2016 renewal orders. Publicly available flight tracking information showed that the aircraft were operated on flights into and out of Iran, including from/to Beijing, China, Kuala Lumpur, Malaysia, and Istanbul, Turkey.<sup>30</sup>

The June 27, 2017 renewal order included similar evidence regarding Mahan Airways' operation of multiple Airbus aircraft subject to the Regulations, including, but not limited to, aircraft procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Moscow, Russia, Shanghai, China and Kabul, Afghanistan. The June 27, 2017 order also detailed evidence concerning a suspected planned or attempted diversion to Mahan of an Airbus A340 subject to the Regulations that had first been mentioned in OEE's December 13, 2016 renewal request.

The December 20, 2017 renewal order presented evidence that a Mahan employee attempted to initiate negotiations with a U.S. company for the purchase of an aircraft subject to the Regulations and classified under ECCN 9A610. Moreover, the order highlighted Al Naser Airlines' acquisition, via lease, of at least possession and/or control of a Boeing 737 (MSN 25361), bearing tail number YR-SEB, and an Airbus A320 (MSN 357), bearing tail number YR-SEA, from a Romanian company in violation of the TDO and the Regulations.<sup>31</sup> Open source information

under ECCN 9A991.b, and its export or re-export to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

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

<sup>31</sup> The Airbus A320 is powered with U.S.-origin engines, which are subject to the EAR and classified under Export Control Classification ("ECCN") 9A991.d. The engines are valued at more than 10 percent of the total value of the aircraft, which

indicates that after the December 20, 2017 renewal order publicly exposed Al Naser's acquisition of these two aircraft (MSNs 25361 and 357), the leases were subsequently cancelled and the aircraft returned to their owner.

The December 20, 2017 renewal order also included evidence indicating that Mahan Airways was continuing to operate a number of aircraft subject to the Regulations, including aircraft originally procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Lahore, Pakistan, Shanghai, China, Ankara, Turkey, Kabul, Afghanistan, and Baghdad, Iraq.

The June 14, 2018 renewal order outlined evidence that Mahan began actively operating EP-MMT, an Airbus A340 aircraft (MSN 292) acquired in 2017 and previously registered in Kazakhstan under tail number UP-A4003, on international flights into and out of Iran.<sup>32</sup> It also discussed evidence that Mahan continued to operate a number of aircraft subject to the Regulations, including, but not limited to, EP-MME, EP-MMF, and EP-MMH, on international flights into and out of Iran, including from/to Beijing, China.

The June 14, 2018 renewal order also noted OFAC's May 24, 2018 designation of Otik Aviation, a/k/a Otik Havacilik Sanayi Ve Ticaret Limited Sirketi, of Turkey, as an SDGT pursuant to Executive Order 13224, for providing material support to Mahan, as well as OFAC's designation as SDGTs of an additional twelve aircraft in which Mahan has an interest.<sup>33</sup> The June 14,

consequently is subject to the EAR. The aircraft is classified under ECCN 9A991.b, and its export or reexport to Iran would require U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

<sup>32</sup> The Airbus A340 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The Airbus A340 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the Regulations regardless of its location. The aircraft is classified under ECCN 9A991.b. The export or re-export of this aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations. On June 4, 2018, EP-MMT (MSN 292) flew from Bangkok, Thailand to Tehran, Iran.

<sup>33</sup> See 83 FR 27,828 (June 14, 2018). OFAC's related press release stated in part that "[o]ver the last several years, Otik Aviation has procured and delivered millions of dollars in aviation-related spare and replacement parts for Mahan Air, some of which are procured from the United States and the European Union. As recently as 2017, Otik Aviation continued to provide Mahan Air with replacement parts worth well over \$100,000 per shipment, such as aircraft brakes." The twelve additional Mahan-related aircraft that were designated are: EP-MMA (MSN 20), EP-MMB (MSN 56), EP-MMC (MSN 282), EP-MMJ (MSN 526), EP-MMV (MSN 2079), EP-MNF (MSN 547), EP-MOD (MSN 3162), EP-MOM (MSN 3165), EP-MOP (MSN 2257), EP-MOQ (MSN 2261), EP-MOR

2018 order also cited the April 2018 arrest and arraignment of a U.S. citizen on a three-count criminal information filed in the United States District Court for the District of New Jersey involving the unlicensed exports of U.S.-origin aircraft parts valued at over \$2 million to Iran, including to Mahan Airways.

The December 11, 2018 renewal order detailed publicly available information showing that Mahan Airways had continued operating a number of aircraft subject to the EAR, including, but not limited to, EP-MMB, EP-MME, EP-MMF, and EP-MMQ, on international flights into and out of Iran from/to Istanbul, Turkey, Guangzhou, China, Bangkok, Thailand, and Dubai, UAE.<sup>34</sup> It also discussed that OEE's continued investigation of Mahan Airways and its affiliates and agents had resulted in an October 2018 guilty plea by Arzu Sagsoz, a Turkish national, in the U.S. District Court for the District of Columbia, stemming from her involvement in a conspiracy to export a U.S.-origin aircraft engine, valued at approximately \$810,000, to Mahan.

The December 11, 2018 order also noted OFAC's September 14, 2018 designation of Mahan-related entities as SDGTs pursuant to Executive Order 13224, namely, My Aviation Company Limited, of Thailand, and Mahan Travel and Tourism SDN BHD, a/k/a Mahan Travel a/k/a Mihan Travel & Tourism SDN BHD, of Malaysia.<sup>35</sup> As general sales agents for Mahan Airways, these companies sold cargo space aboard Mahan Airways' flights, including on flights to Iran, and provided other services to or for benefit of Mahan Airways and its operations.<sup>36</sup>

(MSN 2392), and EP-MOS (MSN 2347). See <https://home.treasury.gov/news/press-releases/sm0395>. See also <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180524.aspx>.

<sup>34</sup> Flight tracking information showed that on December 10, 2018, EP-MMB (MSN 56) flew from Istanbul, Turkey to Tehran, Iran, and EP-MME (MSN 371) flew from Guangzhou, China to Tehran, Iran. Additionally, on December 6, 2018, EP-MMF (MSN 376) flew from Bangkok, Thailand to Tehran, Iran, and on December 9, 2018, EP-MMQ (MSN 449) flew on routes between Dubai, United Arab Emirates and Tehran, Iran.

<sup>35</sup> See 83 FR 34,301 (July 19, 2018) (designation of Mahan Travel and Tourism SDN BHD on July 9, 2018), and 83 FR 53,359 (Oct. 22, 2018) (designation of My Aviation Company Limited and updating of entry for Mahan Travel and Tourism SDN BHD on September 14, 2018).

<sup>36</sup> OFAC's press release concerning its designation of My Aviation Company Limited on September 14, 2018, states in part that "[t]his Thailand-based company has disregarded numerous U.S. warnings, issued publicly and delivered bilaterally to the Thai government, to sever ties with Mahan Air." My Aviation provides cargo services to Mahan Airways, including freight booking, and works with local freight forwarding entities to ship cargo on regularly-scheduled Mahan



The June 5, 2019 renewal order highlighted Mahan's continued violation of the TDO and the Regulations. An end-use check conducted by BIS in Malaysia in March 2019 uncovered evidence that, on approximately ten occasions, Mahan had caused, aided and/or abetted the unlicensed export of U.S.-origin items subject to the Regulations from the United States to Iran via Malaysia. The items included helicopter shafts, transmitters, and other aircraft parts, some of which are listed on the Commerce Control List and controlled on anti-terrorism grounds. The June 5, 2019 order also detailed publicly available flight tracking information showing that Mahan continues to unlawfully operate a number of aircraft subject to the EAR on flights into and out of Iran, including on routes to and from Damascus Syria.<sup>37</sup>

The June 5, 2019 order also described actions taken by both BIS and OFAC to thwart efforts by entities connected to or acting on behalf of Mahan Airways to violate U.S. export controls and sanctions related to Iran. On May 14, 2019, BIS added Manohar Nair, Basha Asmath Shaikh, and two co-located companies that they operate, Emirates Hermes General Trading and Presto Freight International, LLC, to the Entity List pursuant to Section 744.11 of the Regulations, including for engaging in activities to procure U.S.-origin items on Mahan's behalf.<sup>38</sup> On January 24, 2019, OFAC designated as SDGTs Flight Travel LLC, which is Mahan's general service agent in Yerevan, Armenia, and Qeshm Fars Air, an Iranian airline which operates two U.S.-origin Boeing 747s<sup>39</sup> and is owned or controlled by Mahan, and also linked to the Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF).<sup>40</sup>

Airways' flights to Tehran, Iran. My Aviation has also provided Mahan Airways with passenger booking services. See <https://home.treasury.gov/news/press-releases/sm484>.

<sup>37</sup> Specifically, on May 26, 2019, EP-MMJ (MSN 526) flew from Damascus, Syria to Tehran, Iran. In addition, on May 24, 2019, EP-MNF (MSN 547) flew on routes between Moscow, Russia and Tehran, and on May 23, 2019, EP-MMF (MSN 376) flew from Dubai, UAE to Tehran.

<sup>38</sup> See 84 FR 21,233 (May 14, 2019).

<sup>39</sup> These 747s are registered in Iran with tail numbers EP-FAA and EP-FAB, respectively.

<sup>40</sup> OFAC's press release concerning these designations states that Qeshm Fars Air was being designated for "being owned or controlled by Mahan Air, as well as for assisting in, sponsoring, or providing financial, material or technological support for, or financial or other services to or in support of, the IRGC-QF," and that Flight Travel LLC was being designated for "acting for or on behalf of Mahan Air." It further states, *inter alia*, that "Mahan Air employees fill Qeshm Fars Air management positions, and Mahan Air provides technical and operational support for Qeshm Fars

The December 2, 2019 renewal order noted that OEE's on-going investigation revealed that U.S.-origin passenger flight and database management software subject to the Regulations was provided to a company in Turkey and subsequently used to facilitate and service Mahan's operations into and out of Turkey in further violation of the Regulations.

Additionally, open source information, including flight tracking data and news articles published in October 2019, showed that Mahan Airways was now operating a U.S.-origin Boeing 747 on routes between Iranian airports in Tehran, Kish Island, and Mashhad. This aircraft, bearing Iranian tail number EP-MNB, appears to be one of the three aircraft that Mahan illegally acquired via Blue Airways of Armenia and U.K.-based Balli Group that resulted in the issuance of the original TDO.<sup>41</sup> See *supra* at 10–12.

Evidence was also described in the December 2, 2019 renewal order showing that on or about November 11, 2019, Mahan caused, aided and/or abetted the unlicensed export of a U.S.-origin atomic absorption spectrometer, an item subject to the Regulations, from the United States to Iran via the UAE. Finally, publicly available flight tracking information showed that Mahan continued to unlawfully operate a number of aircraft subject to the EAR on flights into and out of Iran, including on routes to and from Guangzhou, China, Istanbul, Turkey, and Kuala Lumpur, Malaysia.<sup>42</sup>

The May 29, 2020 renewal order cited Mahan's operation of EP-MMD, EP-MMF, and EP-MMJ, aircraft originally acquired from Al Naser Airlines, on international flights into and out of Iran from/to Bangkok, Thailand, Dubai, UAE, and Shanghai, China in violation of the TDO and EAR.<sup>43</sup> The May 29, 2020

Air, facilitating the airline's illicit operations." See <https://home.treasury.gov/news/press-releases/sm590>. See also <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190124.aspx>.

<sup>41</sup> The same open sources indicate this aircraft continues to operate on flights within Iran to include a May 11, 2020 flight from Tehran, Iran to Kerman, Iran.

<sup>42</sup> Publicly available flight tracking information shows that on November 23, 2019, EP-MME (MSN 371) flew from Guangzhou, China to Tehran, Iran, and on November 21, 2019, EP-MMF (MSN 376) flew on routes between Istanbul, Turkey and Tehran, Iran. Additionally, on November 20, 2019, EP-MMQ (MSN 449) flew from Kuala Lumpur, Malaysia, to Tehran, Iran.

<sup>43</sup> Publicly available flight tracking information shows that on May 8, 2020, EP-MMD (MSN 164) flew on routes between Bangkok, Thailand and Tehran, Iran, and on May 10, 2020, EP-MMF (MSN 376) flew on routes between Dubai, UAE and Tehran, Iran. In addition, on May 9, 2020, EP-MMJ (MSN 416) flew on routes between Shanghai, China and Tehran.

renewal order also detailed the indictment of Ali Abdullah Alhay and Issam Shammout, parties added to the TDO in May and July 2015, respectively, in the United States District Court for the District of Columbia. Alhay and Shammout were charged with, among other violations, conspiring to export aircraft and parts to Mahan in violation of export control laws and the embargo on Iran beginning around August 2012 through May 2015.

OEE's on-going investigation since the May 29, 2020 renewal order further demonstrate the nature of Mahan Airways' prior actions and its continued actions in violation of the TDO and the Regulations, both directly and through its widespread network of procurement agents, front companies, and intermediaries. In particular, Mahan Airways continues to operate a number of aircraft subject to the EAR, including, but not limited to, EP-MMQ and EP-MMJ, on international flights into and out of Iran from/to Shenzhen, China and Istanbul, Turkey, respectively. These flights have continued since the October 28, 2020 renewal request was submitted.<sup>44</sup>

In addition, OEE and its U.S. Government partners, including OFAC and the Department of Justice, have continued their multi-faceted efforts to hold Mahan Airways and its wide-reaching network of affiliates, front companies and agents accountable for violations of U.S. export control laws. BIS, for example, issued a TDO on August 19, 2020, denying for 180 days the export privileges of Indonesia-based PT MS Aero Support ("PTMS Aero"), PT Antasena Kreasi ("PTAK"), PT Kandiyasa Energi Utama ("PTKEU"), Sunarko Kuntjoro, Triadi Senna Kuntjoro, and Satrio Wiharjo Sasmito based on their involvement in the unlicensed export of aircraft parts to Mahan Airways—often in coordination with Mustafa Ovieci, a Mahan executive.<sup>45</sup> These parties also facilitated the shipment of damaged Mahan parts to the United States for repair and subsequent export back to Iran in further violation of U.S. laws. In both instances, the fact that the items were destined to Iran/Mahan was concealed from U.S. companies, shippers, and freight forwarders.<sup>46</sup>

<sup>44</sup> Publicly available flight tracking information shows that on November 13, 2020, EP-MMQ (MSN 449) flew on routes between Istanbul, Turkey and Tehran, Iran, and on November 15, 2020, EP-MMJ (MSN 416) flew on routes between Shenzhen, China and Tehran.

<sup>45</sup> See 85 FR 52,321 (Aug. 25, 2020).

<sup>46</sup> PTMS Aero, PTAK, PTKEU, and Sunarko Kuntjoro were each indicted in December 2019 on

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Also, on August 19, 2020, OFAC designated UAE-based Parthia Cargo, its CEO Amin Mahdavi, and Delta Parts Supply FZC as SDGTs pursuant to Executive Order 13224 for providing “key parts and logistics services for Mahan Air . . . .” The OFAC press release further states in part that Mahdavi “has directly coordinated the shipment of parts on behalf of Mahan Air.”<sup>47</sup> Mahdavi and Parthia Cargo were also indicted in the United States District Court for the District of Columbia for violating sanctions on Iran.<sup>48</sup>

Additionally, in October 2020, the U.S. District Court for the District of New Jersey sentenced Joyce Eliasbachus to 18 months of confinement based on her role in a conspiracy to export \$2 million dollars’ worth of aircraft parts from the United States to Iran, including to Mahan Airways.<sup>49</sup>

Through these efforts and others, OEE and its law enforcement partners are continuing their efforts to disrupt Mahan’s illicit acquisition of aircraft and parts as well as its role in transporting or forwarding such items.

### C. Findings

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

multiple counts related to this conspiracy in the United States District Court for the District of Columbia.

<sup>47</sup> <https://home.treasury.gov/news/press-releases/sm1098>.

<sup>48</sup> <https://www.justice.gov/opa/pr/iranian-national-and-uae-business-organization-charged-criminal-conspiracy-violate-iranian>.

<sup>49</sup> Eliasbachus’ arrest and arraignment were detailed in the June 14, 2018 renewal order, as described *supra* at 21.

### III. Order

*It is therefore ordered:*

First, that MAHAN AIRWAYS, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran; PEJMAN MAHMOOD KOSARAYANIFARD A/K/A KOSARIAN FARD, P.O. Box 52404, Dubai, United Arab Emirates; MAHMOUD AMINI, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates; KERMAN AVIATION A/K/A GIE KERMAN AVIATION, 42 Avenue Montaigne 75008, Paris, France; SIRJANCO TRADING LLC, P.O. Box 8709, Dubai, United Arab Emirates; MAHAN AIR GENERAL TRADING LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates; MEHDI BAHRAMI, Mahan Airways-Istanbul Office, Cumhuriye Cad. Sibil Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey; AL NASER AIRLINES A/K/A AL-NASER AIRLINES A/K/A AL NASER WINGS AIRLINE A/K/A ALNASER AIRLINES AND AIR FREIGHT LTD., Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadriya Private Hospital, Baghdad, Iraq, and Al Amirat Street, Section 309, St. 3/H.20, Al Mansour, Baghdad, Iraq, and P.O. Box 28360, Dubai, United Arab Emirates, and P.O. Box 911399, Amman 11191, Jordan; ALI ABDULLAH ALHAY A/K/A ALI ALHAY A/K/A ALI ABDULLAH AHMED ALHAY, Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadriya Private Hospital, Baghdad, Iraq, and Anak Street, Qatif, Saudi Arabia 61177; BAHAR SAFWA GENERAL TRADING, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates, and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates; SKY BLUE BIRD GROUP A/K/A SKY BLUE BIRD AVIATION A/K/A SKY BLUE BIRD LTD A/K/A SKY BLUE BIRD FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates; and ISSAM SHAMMOUT A/K/A MUHAMMAD ISAM MUHAMMAD ANWAR NUR SHAMMOUT A/K/A ISSAM ANWAR, Philips Building, 4th Floor, Al Fardous Street, Damascus, Syria, and Al Kolaa, Beirut, Lebanon 151515, and 17-18 Margaret Street, 4th Floor, London, W1W 8RP, United Kingdom, and Cumhuriyet Mah. Kavakli San St. Fulya, Cad. Hazar Sok. No.14/A Silivri, Istanbul, Turkey, and when acting for or on their behalf, any successors or assigns, agents, or employees (each a

“Denied Person” and collectively the “Denied Persons”) may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

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

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

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

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

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

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

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

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

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

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

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

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

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

A copy of this Order shall be provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading and each related person, and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

**P. Lee Smith,**

*Performing the Non-exclusive Functions and Duties, of the Assistant Secretary of Commerce for Export Enforcement.*

[FR Doc. 2020-26434 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-DT-P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

[Docket No. 201118-0304]

**RIN 0694-XC070**

#### **Impact of the Implementation of the Chemical Weapons Convention (CWC) on Legitimate Commercial Chemical, Biotechnology, and Pharmaceutical Activities Involving "Schedule 1" Chemicals (Including "Schedule 1" Chemicals Produced as Intermediates) During Calendar Year 2020**

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Bureau of Industry and Security is seeking public comments on the impact that implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act of 1998 and the Chemical Weapons Convention Regulations, has had on commercial activities involving "Schedule 1" chemicals during calendar year 2020. The purpose of this notice of inquiry is to collect information to assist BIS in its preparation of the annual certification to the Congress on whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms are harmed by such implementation. This certification is required under Condition 9 of Senate Resolution 75 (April 24, 1997), in which the Senate gave its advice and consent to the ratification of the CWC.

**DATES:** Comments must be received by December 31, 2020.

**ADDRESSES:** You may submit comments by any of the following methods (please refer to RIN 0694-XC070 in all comments and in the subject line of email comments):

- Federal rulemaking portal (<http://www.regulations.gov>). You can find this notice by searching under its regulations.gov docket number, which is BIS-2020-0039;
- Email: [PublicComments@bis.doc.gov](mailto:PublicComments@bis.doc.gov). Include RIN 0694-XC070 in the subject line of the message.

All filers using the portal or email should use the name of the person or

entity submitting the comments as the name of their files, in accordance with the instructions below. Parties submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and also provide a non-confidential submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters "BC." Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page. The corresponding non-confidential version of those comments must be clearly marked "PUBLIC." The file name of the non-confidential version should begin with the character "P." The "BC" and "P" should be followed by the name of the person or entity submitting the comments or rebuttal comments. Any submissions with file names that do not begin with a "P" or "BC" will be assumed to be public and will be made publicly available through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** For questions on the Chemical Weapons Convention requirements for "Schedule 1" chemicals, contact Douglas Brown, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Email: [Douglas.Brown@bis.doc.gov](mailto:Douglas.Brown@bis.doc.gov). For questions on the submission of comments, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Email: [RPD2@bis.doc.gov](mailto:RPD2@bis.doc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

In providing its advice and consent to the ratification of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC or "the Convention"), the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its ratification. Condition 9, titled "Protection of Advanced Biotechnology," calls for the President to certify to Congress on an annual basis that "the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical

firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1.” On July 8, 2004, President Bush, by Executive Order 13346, delegated his authority to make the annual certification to the Secretary of Commerce.

The CWC is an international arms control treaty that contains certain verification provisions. In order to implement these verification provisions, the CWC established the Organization for the Prohibition of Chemical Weapons (OPCW). In order to achieve the object and purpose of the Convention and the implementation of its provisions, the CWC imposes certain obligations on countries that have ratified the Convention (*i.e.*, States Parties), among which are the enactment of legislation to prohibit the production, storage, and use of chemical weapons and the establishment of a National Authority to serve as the national focal point for effective liaison with the OPCW and other States Parties. The CWC also requires each State Party to implement a comprehensive data declaration and inspection regime to provide transparency and to verify that both the public and private sectors of the State Party are not engaged in activities prohibited under the CWC. In the United States, the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. 6701 *et seq.*, implements the provisions of the CWC.

“Schedule 1” chemicals consist of those toxic chemicals and precursors set forth in the CWC “Annex on Chemicals” and in “Supplement No. 1 to part 712—SCHEDULE 1 CHEMICALS” of the Chemical Weapons Convention Regulations (CWCRC) (15 CFR parts 710–722). The CWC identified these toxic chemicals and precursors as posing a high risk to the object and purpose of the Convention.

The CWC (Part VI of the “Verification Annex”) restricts the production of “Schedule 1” chemicals for protective purposes to two facilities per State Party: A single small-scale facility (SSSF) and a facility for production in quantities not exceeding 10 kg per year. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103–21 defined the term “protective purposes” to mean “used for determining the adequacy of defense equipment and measures.” Consistent with this definition and as authorized by Presidential Decision Directive (PDD) 70 (December 17, 1999), which specifies agency and departmental responsibilities as part of the U.S. implementation of the CWC, the

Department of Defense (DOD) was assigned the responsibility to operate these two facilities. DOD maintains strict controls on “Schedule 1” chemicals produced at its facilities in order to ensure accountability for such chemicals, as well as their proper use, consistent with the object and purpose of the Convention. Although this assignment of responsibility to DOD under PDD–70 effectively precluded commercial production of “Schedule 1” chemicals for “protective purposes” in the United States, it did not establish any limitations on “Schedule 1” chemical activities that are not prohibited by the CWC.

The provisions of the CWC that affect commercial activities involving “Schedule 1” chemicals are implemented in the CWCRC (*see* 15 CFR part 712) and in the Export Administration Regulations (EAR) (*see* 15 CFR 742.18 and 15 CFR part 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCRC restrict commercial production of “Schedule 1” chemicals to research, medical, or pharmaceutical purposes. The CWCRC prohibit commercial production of “Schedule 1” chemicals for “protective purposes” because such production is effectively precluded per PDD–70, as described above. *See* 15 CFR 712.2(a).

The CWCRC also contain other requirements and prohibitions that apply to “Schedule 1” chemicals and/or “Schedule 1” facilities. Specifically, the CWCRC:

- (1) Prohibit the import of “Schedule 1” chemicals from States not Party to the Convention (15 CFR 712.2(b));
- (2) Require annual declarations by certain facilities engaged in the production of “Schedule 1” chemicals in excess of 100 grams aggregate per calendar year (*i.e.*, declared “Schedule 1” facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));
- (3) Provide for government approval of “declared Schedule 1” facilities (15 CFR 712.5(f));
- (4) Require 200 days advance notification of the establishment of new “Schedule 1” production facilities producing greater than 100 grams aggregate of “Schedule 1” chemicals per calendar year (15 CFR 712.4);
- (5) Provide that “declared Schedule 1” facilities are subject to initial and routine inspection by the OPCW (15 CFR 712.5(e) and 716.1(b)(1));
- (6) Require advance notification and annual reporting of all imports and exports of “Schedule 1” chemicals to, or from, other States Parties to the

Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and

- (7) Prohibit the export of “Schedule 1” chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

For purposes of the CWCRC (*see* 15 CFR 710.1), “production of a Schedule 1 chemical” means the formation of “Schedule 1” chemicals through chemical synthesis, as well as processing to extract and isolate “Schedule 1” chemicals. The phrase “production of a schedule 1 chemical” includes, in its meaning, the formation of a chemical through chemical reaction, including by a biochemical or biologically mediated reaction. “Production of a Schedule 1 chemical” is understood, for CWCRC declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

### Request for Comments

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, “Schedule 1” chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the CWC, through the Chemical Weapons Convention Implementation Act of 1998 and the CWCRC, has had on commercial activities involving “Schedule 1” chemicals during calendar year 2020. To allow BIS to properly evaluate the significance of any harm to commercial activities involving “Schedule 1” chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

### Submission of Comments

All comments must be submitted to one of the addresses indicated in this notice and in accordance with the instructions provided herein. BIS will

consider all comments received on or before December 31, 2020.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc. 2020–26437 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–570–133]

#### **Certain Metal Lockers and Parts Thereof From the People's Republic of China: Postponement of Preliminary Determination in the Less-Than-Fair-Value Investigation**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**DATES:** Applicable December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Laurel LaCivita or Patrick Barton, 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) 482–4243 or (202) 482–0012, respectively.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On July 29, 2020, the Department of Commerce (Commerce) initiated a less-than-fair-value (LTFV) investigation of imports of certain metal lockers and parts thereof (metal lockers) from the People's Republic of China (China).<sup>1</sup> Currently, the preliminary determination is due no later than December 16, 2020.

##### **Postponement of Preliminary Determination**

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1)(A)(b)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) The petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are

cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On November 20, 2020, the petitioners<sup>2</sup> submitted a timely request that Commerce postpone the preliminary determination in the LTFV investigation.<sup>3</sup> The petitioners state that a postponement is necessary to provide Commerce with adequate time to collect and analyze questionnaire responses from Zhejiang Xingyi Metal Products Co., Ltd. (Zhejiang Xingyi) and Hangzhou Xline Machinery & Equipment Co., Ltd. (Hangzhou Xline), review data to identify deficiencies, and to fully investigate the extent to which Zhejiang Xingyi and Hangzhou Xline have engaged in less-than-fair-value sales of the subject merchandise based on a comprehensive preliminary record.<sup>4</sup>

For the reasons stated above and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for the preliminary determination by 50 days (*i.e.*, 190 days after the date on which this investigation was initiated). As a result, Commerce will issue its preliminary determination no later than February 4, 2020. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination, unless postponed at a later date.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: November 24, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2020–26488 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–DS–P**

<sup>2</sup> The petitioners are List Industries, Inc.; Penco Products, Inc.; DeBourgh Manufacturing Co.; and Tennsco LLC (collectively, the petitioners).

<sup>3</sup> See Petitioners' Letter, "Certain Metal Lockers and Parts Thereof from the People's Republic of China—Petitioners' Request to Postpone Preliminary Determination," dated November 20, 2020.

<sup>4</sup> *Id.* at 2.

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–570–051]

#### **Certain Hardwood Plywood Products From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018**

**AGENCY:** Enforcement and Compliance International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) determines that certain producers and exporters of certain hardwood plywood products (hardwood plywood) from the People's Republic of China (China) made sales of the subject merchandise at prices below normal value (NV) during the period of review (POR), June 23, 2017 through December 31, 2018.

**DATES:** Applicable December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Kabir Archuleta, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2593.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Commerce is conducting an administrative review of the antidumping duty order on hardwood plywood from China in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).<sup>1</sup> On February 7, 2020, Commerce published in the **Federal Register** the *Preliminary Results* of this administrative review.<sup>2</sup> On June 29, 2020, we received case briefs from Linyi Chengen Import and Export Co., Ltd. (Chengen), the sole mandatory respondent in this review,<sup>3</sup> and Canusa Wood Products Ltd. a/k/a Canusa Wood Products Limited, Richmond International Forest Products LLC, Taraca Pacific Inc., and Concannon Corp. (collectively, the Importers Coalition).<sup>4</sup> On June 30, 2020, we

<sup>1</sup> See *Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 FR 504 (January 4, 2018) (Order).

<sup>2</sup> See *Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission of Review, In Part 2017–2018*, 85 FR 7270 (February 7, 2020) (*Preliminary Results*).

<sup>3</sup> See Chengen's Letter, "Hardwood Plywood Products from the People's Republic of China: Case Brief," dated June 29, 2020.

<sup>4</sup> See Importers Coalition's Letter, "Administrative Review of the Antidumping Duty Order on Plywood Products from the People's

Continued

<sup>1</sup> See *Certain Metal Lockers and Parts Thereof from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 85 FR 47343 (August 5, 2020).

received a case brief on behalf of the Coalition for Fair Trade in Hardwood Plywood (the petitioner).<sup>5</sup> On July 6, 2020, we received a rebuttal brief on behalf of Cosco Star International Co., Ltd.; Shandong Jinhua International Trading Co., Ltd.; Qingdao Top P&Q International Corp.; Jiangsu High Hope Arser Co., Ltd.; Pingyi Jinniu Wood Co., Ltd.; Linyi Dahua Wood Co., Ltd.; Happy Wood Industrial Group Co., Ltd.; Xuzhou Amish Import & Export Co., Ltd.; and Zhejiang Dehua TB Import & Export Co., Ltd. (Separate Rate Respondents).<sup>6</sup> On July 10, 2020, we received rebuttal briefs from the Importers Coalition, Chengen, and the petitioner.<sup>7</sup>

A complete summary of the events that occurred since publication of the *Preliminary Results* may be found in the Issues and Decision Memorandum.<sup>8</sup>

### Scope of the Order

The product covered by the *Order* is hardwood plywood from China. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

### Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are listed in the appendix to this notice and are addressed in the Issues and Decision Memorandum. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's

Republic of China: Letter in Lieu of Case Brief," dated June 29, 2020.

<sup>5</sup> See Petitioner's Letter, "Hardwood Plywood Products from the People Republic of China: Petitioner's Case Brief," dated June 29, 2020. On November 13, 2020, at the request of Commerce and with the consent of Chengen, the petitioner submitted a revised case brief to publicly state information that had previously been treated as business proprietary information. See Petitioner's Letter, "Petitioner's Resubmission of Case Brief," dated November 23, 2020; see also Memorandum, "Request for Revised Bracketing of Case Brief," dated November 12, 2020.

<sup>6</sup> See Separate Rate Respondents' Letter, "Hardwood Plywood Products from the People's Republic of China: Rebuttal Brief," dated July 6, 2020.

<sup>7</sup> See Importers Coalition's Letter, "Administrative Review of the Antidumping Duty Order on Plywood Products from the People's Republic of China: Rebuttal Brief," dated July 10, 2020; see also Chengen's Letter, "Hardwood Plywood Products from the People's Republic of China: Rebuttal Briefs," dated July 10, 2020, and Petitioner's Letter, "Hardwood Plywood Products from People Republic of China: Petitioner's Rebuttal Case Brief," dated July 10, 2020.

<sup>8</sup> See Memorandum, "Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Hardwood Plywood Products from the People's Republic of China: 2017–2018," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

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 Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/index.html>. The signed Issues and Decision Memorandum and the electronic version of the Issues and Decision Memorandum are identical in content.

### Changes Since the Preliminary Results

Based on our analysis of the comments received, and for the reasons explained in the Issues and Decision Memorandum, Commerce made certain changes to the *Preliminary Results*. Specifically, we revised the calculation of the surrogate financial ratios, the surrogate value for formaldehyde, and the surrogate value for labor.

### Separate Rates

In the *Preliminary Results*, we found that information placed on the record by Chengen, as well as by the other companies listed in the rate table in the "Final Results of Review" section below, demonstrates that these companies are entitled to separate rate status. We received no arguments since the *Preliminary Results* that provide a basis for reconsidering the determination with respect to the separate rate status of these entities. Therefore, for the final results, we continue to find Chengen and the other companies listed below, eligible for a separate rate. In this administrative review, Chengen is the only reviewed respondent that received a calculated weighted-average margin. Therefore, for the final results, Commerce has assigned Chengen's weighted-average margin to the non-selected separate-rate companies.<sup>9</sup>

In addition, Commerce continues to find that certain companies did not demonstrate their eligibility for separate rate status because they did not timely file a separate rate application or certification and, consequently, did not rebut the presumption of *de jure* or *de facto* government control of their operations. See Appendix II of this notice for a complete list of companies not receiving a separate rate.

### Final Results of Review

Commerce determines that the following weighted-average dumping

margins exist for the POR from June 23, 2017 through December 31, 2018:

| Exporters                                                   | Dumping margin (percent) |
|-------------------------------------------------------------|--------------------------|
| Linyi Chengen Import and Export Co., Ltd .....              | 14.95                    |
| Review-Specific Rate Applicable to the Following Companies: |                          |
| Anhui Hoda Wood Co., Ltd .....                              | 14.95                    |
| Cosco Star International Co., Ltd .....                     | 14.95                    |
| Happy Wood Industrial Group Co., Ltd .....                  | 14.95                    |
| Jiangsu High Hope Arser Co., Ltd .....                      | 14.95                    |
| Jiaxing Hengtong Wood Co., Ltd .....                        | 14.95                    |
| Linyi Evergreen Wood Co., Ltd .....                         | 14.95                    |
| Linyi Glary Plywood Co., Ltd .....                          | 14.95                    |
| Linyi Huasheng Yongbin Wood Co., Ltd .....                  | 14.95                    |
| Linyi Jiahe Wood Industry Co., Ltd .....                    | 14.95                    |
| Linyi Sanfortune Wood Co., Ltd .....                        | 14.95                    |
| Qingdao Top P&Q International Corp .....                    | 14.95                    |
| Shanghai Brightwood Trading Co., Ltd .....                  | 14.95                    |
| Shanghai Futuwood Trading Co., Ltd .....                    | 14.95                    |
| Shanghai Luli Trading Co., Ltd .....                        | 14.95                    |
| Suqian Hopeway International Trade Co., Ltd ....            | 14.95                    |
| Suzhou Oriental Dragon Import and Export Co., Ltd ..        | 14.95                    |
| Xuzhou Jiangheng Wood Products Co., Ltd .....               | 14.95                    |
| Xuzhou Jiangyang Wood Industries Co., Ltd .....             | 14.95                    |
| Xuzhou Timber International Trade Co., Ltd .....            | 14.95                    |
| Zhejiang Dehua TB Import & Export Co., Ltd .....            | 14.95                    |

### Assessment Rates

Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b). In accordance with 19 CFR 351.212(b)(1), we have calculated importer-specific (or customer-specific) assessment rates for merchandise subject to this review.<sup>10</sup> For these final results, we divided the total dumping margins (calculated as the difference between NV and export price) for Chengen's importers or customers by the total sales quantity associated with those transactions. Where an importer-

<sup>9</sup> For further discussion regarding the rate assigned to the non-selected companies, see Comment 4 of the Issues and Decision Memorandum.

<sup>10</sup> See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification*).

specific *ad valorem* or per-unit assessment rate is not zero or *de minimis*, Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondent's weighted-average dumping margin is zero or *de minimis*, or an importer-specific *ad valorem* or per-unit assessment rate is zero or *de minimis*, Commerce will instruct CBP to liquidate appropriate entries without regard to AD duties.<sup>11</sup> We intend to instruct CBP to take into account the "provisional measures deposit cap," in accordance with 19 CFR 351.212(d).

Pursuant to Commerce's practice, for entries that were not reported in the U.S. sales data submitted by Chengen during this review, Commerce will instruct CBP to liquidate such entries at the rate for the China-wide entity.<sup>12</sup>

For the respondents that were not selected for individual examination in this administrative review and that qualified for a separate rate, the assessment rate will be equal to the weighted-average dumping margin determined for Chengen in these final results of review, identified above. We will also instruct CBP to take into account the "provisional measures deposit cap" in accordance with 19 CFR 351.212(d).

For the seven exporters found not to qualify for separate rates that are being treated as part of the China-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 183.36 percent, the current rate established for the China-wide entity, to all entries of subject merchandise during the POR which were exported by those companies.

Commerce intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of this review in the **Federal Register**.

#### Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Chengen and other exporters that have been found eligible for a separate rate in this review will be equal to the dumping margin established for Chengen in these final results of review; (2) for previously

investigated or reviewed Chinese and non-Chinese exporters not listed above that have received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific cash deposit rate published for the completed segment of the most recent period; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will continue to be 183.36 percent, the China-wide rate determined in the less-than-fair-value investigation; (4) for all non-Chinese exporters of subject merchandise that have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

#### Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

#### Administrative Protective Order

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the term of an APO is a violation subject sanction.

#### Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: November 23, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

#### Appendix I—List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Changes Since the Preliminary Results
- V. Discussion of the Issues
  - Comment 1: Whether Commerce Should Postpone the Final Results Until It Is Able To Conduct Verification
  - Comment 2: Whether Commerce Should Apply the Intermediate Input Methodology
  - Comment 3: Surrogate Financial Ratios
  - Comment 4: Separate Rate
  - Comment 5: Surrogate Values (SVs)
    - A. SV for Logs
    - B. SV for Formaldehyde
    - C. SV for Labor
- VI. Recommendation

#### Appendix II—List of Companies Not Receiving Separate Rate Status

- 1. Jiangsu Sunwell Cabinetry Co., Ltd.
- 2. Linyi Bomei Furniture Co., Ltd.
- 3. Linyi Dahua Wood Co., Ltd.
- 4. Pingyi Jinniu Wood Co., Ltd.
- 5. SAICG International Trading Co., Ltd.
- 6. Shandong Jinhua International Trading Co., Ltd.
- 7. Xuzhou Amish Import & Export Co., Ltd.

[FR Doc. 2020-26495 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-DS-P**

#### DEPARTMENT OF COMMERCE

##### International Trade Administration

[A-520-807]

#### Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2017-2018

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than fair value (LTFV) during the period of review (POR), December 1, 2017 through November 30, 2018.

**DATES:** Applicable December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Whitley Herndon, 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) 482-6274.

**SUPPLEMENTARY INFORMATION:**

<sup>11</sup> *Id.*, 77 FR at 8103.

<sup>12</sup> See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011), for a full discussion of this practice.



## Background

This review covers 20 producers and exporters of the subject merchandise. Commerce selected two mandatory respondents for individual examination: Conares Metal Supply Ltd. (Conares) and Universal Tube and Plastic Industries, Ltd./THL Tube and Pipe Industries LLC/KHK Scaffolding and Framework LLC (collectively, Universal). The producers and or exporters not selected for individual examination are listed in the “Final Results of the Review” section of this notice.

On February 7, 2020, Commerce published the *Preliminary Results*.<sup>1</sup> In April and June 2020, the petitioners,<sup>2</sup> Nucor Tubular Products Inc., Conares, and Universal, submitted case and rebuttal briefs. On April 23, 2020, we postponed the final results until June 8, 2020.<sup>3</sup> On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.<sup>4</sup> On July 21, 2020, Commerce tolled all preliminary and final deadlines in administrative reviews by an additional 60 days, thereby extending the deadline for these results until November 23, 2020.<sup>5</sup>

Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

## Scope of the Order

The merchandise subject to the order is welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish, end finish, or industry specification, and generally known as standard pipe, fence pipe and tube, sprinkler pipe, or structural pipe (although subject product may also be referred to as mechanical tubing). The products subject to this order are currently classifiable in Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. Although the HTSUS numbers are provided for convenience and for customs purposes, the written product description remains dispositive.<sup>6</sup>

## Analysis of Comments Received

All issues raised in the case and rebuttal briefs are listed in the Appendix to this notice and addressed in the Issues and Decision

Memorandum. Interested parties can find a complete discussion of these issues and the corresponding recommendations in this public memorandum, which 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/index.html>. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

## Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results*, we made certain changes to the preliminary weighted-average margin calculations for Universal and for those companies not selected for individual review.<sup>7</sup>

## Final Results of the Review

We are assigning the following weighted-average dumping margins to the firms listed below for the period December 1, 2017 through November 30, 2018:

| Exporter/producer                                                                                                    | Weighted-average dumping margin (percent) |
|----------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| Conares Metal Supply Ltd .....                                                                                       | 2.49                                      |
| Universal Tube and Plastic Industries, Ltd./THL Tube and Pipe Industries LLC/KHK Scaffolding and Framework LLC ..... | 3.79                                      |

## Review-Specific Average Rate Applicable to the Following Companies:<sup>8</sup>

| Exporter/producer                                                                      | Weighted-average dumping margin (percent) |
|----------------------------------------------------------------------------------------|-------------------------------------------|
| Abu Dhabi Metal Pipes and Profiles Industries Complex .....                            | 3.14                                      |
| Ajmal Steel Tubes & Pipes Ind. L.L.C./Noble Steel Industries L.L.C. <sup>9</sup> ..... | 3.14                                      |
| Al Mansoori Industrial Supply .....                                                    | 3.14                                      |
| Baker Hughes EHO Ltd .....                                                             | 3.14                                      |

<sup>1</sup> See *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 85 FR 7279 (February 7, 2020) (*Preliminary Results*).

<sup>2</sup> The petitioners are Bull Moose Tube Company and Wheatland Tube Company.

<sup>3</sup> See Memorandum, “Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: 2017–2018 Administrative Review: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,” dated April 23, 2020.

<sup>4</sup> 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.

<sup>5</sup> See Memorandum, “Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,” dated July 21, 2020.

<sup>6</sup> For a complete description of the scope of the order, see Memorandum, “Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates,” dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

<sup>7</sup> See accompanying Issues and Decision Memorandum.

<sup>8</sup> This rate is based on the simple average of the margins calculated for those companies selected for individual review. Because we cannot apply our normal methodology of calculating a weighted-average margin due to requests to protect business proprietary information, we find this rate to be the best proxy of the actual weighted-average margin determined for the mandatory respondents. See *Ball Bearings and Parts Thereof from France, et al.: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part*, 75 FR 53661, 53663 (September 1, 2010).



| Exporter/producer                                 | Weighted-average dumping margin (percent) |
|---------------------------------------------------|-------------------------------------------|
| BioAir Solutions LLC .....                        | 3.14                                      |
| Bridgeway Shipping & Clearing Services, LLC ..... | 3.14                                      |
| Ferrofab FTZ .....                                | 3.14                                      |
| Ferrolab LLC .....                                | 3.14                                      |
| Global Steel Industries .....                     | 3.14                                      |
| Halima Pipe Co., Ltd .....                        | 3.14                                      |
| K.D. Industries Inc .....                         | 3.14                                      |
| Lamprell .....                                    | 3.14                                      |
| Link Middle East Ltd .....                        | 3.14                                      |
| Noble Marine Metals Co., W.L.L .....              | 3.14                                      |
| PSL FZE .....                                     | 3.14                                      |
| Reyah Metal Trading FZE .....                     | 3.14                                      |
| Three Star Metal Ind LLC .....                    | 3.14                                      |
| Tiger Steel Industries LLC .....                  | 3.14                                      |

We intend to disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding, in accordance with 19 CFR 351.224(b).

#### Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), where Conares and Universal reported the entered value of their U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, we will assign an assessment rate based on the average<sup>10</sup> of the cash deposit rates calculated for Conares and Universal. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results

of this review and for future deposits of estimated duties, where applicable.<sup>11</sup>

Commerce's "automatic assessment" practice will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (e.g., a reseller, trading company, or exporter) was destined for the United States. In such instances, 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.

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this administrative review.

#### Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not subject to this review, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is,

then the cash deposit rate will be the rate established for the most recent segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 3.14 percent, the all-others rate established in the LTFV investigation.<sup>12</sup> These deposit requirements, when imposed, shall remain in effect until further notice.

#### Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

#### Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations

<sup>9</sup> We collapsed Ajmal Steel Tubes and Pipes Ind. L.L.C. and Noble Steel Industries L.L.C. together in the final results of the 2016–2017 administrative review. See *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 84 FR 44845 (August 27, 2019).

<sup>10</sup> This rate was calculated as discussed in footnote 8.

<sup>11</sup> See section 751(a)(2)(C) of the Act.

<sup>12</sup> See *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders*, 81 FR 91906, 91908 (December 19, 2016).

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 751(a)(1) and 777(i) of the Act.

Dated: November 23, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

#### Appendix

##### List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Margin Calculations
- IV. Discussion of Issues
  - Conares-Specific Issues*
  - Comment 1: Application of Adverse Facts Available (AFA) Based on Alleged Duty Avoidance Scheme
  - Comment 2: Failure to Cooperate
  - Universal-Specific Issues*
  - Comment 3: Universal Level of Trade (LOT) Adjustment
  - Comment 4: Section 232 Duties
  - Comment 5: Convert Currency for Universal Sales
  - Comment 6: Adjust Universal Surrogate Production Cost
- V. Recommendation

[FR Doc. 2020-26489 Filed 11-30-20; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-570-106]

#### Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) has determined that a request for a new shipper review (NSR) of the antidumping duty order on wooden cabinets and vanities and components thereof (wooden cabinets and vanities) from the People's Republic of China (China) meets the statutory and regulatory requirements for initiation. The period of review (POR) for the NSR is April 1, 2020 through September 30, 2020.

**DATES:** Effective December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Jacob Keller, AD/CVD Operations Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401

Constitution Avenue NW, Washington, DC 20230; Telephone: (202) 482-4849.

#### SUPPLEMENTARY INFORMATION:

##### Background

Commerce published the *Order* on wooden cabinets and vanities on April 21, 2020.<sup>1</sup> On October 30, 2020, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(c), Commerce received a timely NSR request from Dalin Hualing Wood Co., Ltd. (Hualing).<sup>2</sup>

In its submission, Hualing certified that it is the exporter of the subject merchandise subject to this NSR request.<sup>3</sup> Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(ii)(A), Hualing certified that it did not export wooden cabinets and vanities to the United States during the period of investigation (POI).<sup>4</sup> Additionally, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Hualing certified that, since the initiation of the investigation, it has not been affiliated with any producer or exporter that exported wooden cabinets and vanities to the United States during the POI, including those not individually examined during the investigation.<sup>5</sup> As required by 19 CFR 351.214(b)(2)(iii)(B), Hualing also certified that its export activities are not controlled by the central government of China.<sup>6</sup> Further, Hualing stated that it has not made subsequent shipments of subject merchandise during the POR.<sup>7</sup>

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Hualing submitted documentation establishing the following: (1) The date on which it first shipped subject merchandise for export to the United States; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.<sup>8</sup>

Commerce conducted a query of U.S. Customs and Border Protection (CBP) data and confirmed that Hualing's subject merchandise entered the United

States for consumption and that liquidation of such entries had been properly suspended for antidumping duties. The CBP data that Commerce examined are consistent with information provided by Hualing in its NSR request. In particular, the CBP data confirm the price and quantity reported by Hualing for the sale that forms the basis of its NSR request.<sup>9</sup>

##### Period of Review

In accordance with 19 CFR 351.214(g)(1)(i)(B), the POR for an NSR initiated in the month immediately following the semiannual anniversary month will be the six-month period immediately preceding the semiannual anniversary month. Therefore, the POR for this NSR is April 1, 2020, through September 30, 2020.

##### Initiation of NSR

Pursuant to section 751(a)(2)(B) of the Act and 19 CFR 351.214(b), and based on the information on the record, we find that Hualing's NSR request meets the threshold requirements for initiation of an NSR of its shipment(s) of wooden cabinets and vanities to the United States.<sup>10</sup> However, if the information supplied by Hualing is later found to be incorrect or insufficient during the course of this NSR, Commerce may rescind the review or apply adverse facts available, pursuant to section 776 of the Act, as appropriate. Pursuant to 19 CFR 351.221(c)(1)(i), Commerce will publish the notice of initiation of an NSR no later than the last day of the month following the anniversary or semiannual anniversary month of the order. Commerce intends to issue the preliminary results of this review no later than 180 days from the date of initiation, and the final results of this review no later than 90 days after the date the preliminary results are issued.<sup>11</sup>

It is Commerce's practice in cases involving non-market economies to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate (*i.e.*, separate rate) provide evidence of *de jure* and *de facto* absence of government control over the company's export activities.<sup>12</sup>

<sup>9</sup> *Id.*; see also Memorandum, "Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Initiation Checklist for Antidumping Duty New Shipper Review of Dalin Hualing Wood Co., Ltd." dated concurrently with this notice.

<sup>10</sup> See generally NSR Request.

<sup>11</sup> See section 751(a)(2)(B)(iii) of the Act.

<sup>12</sup> See Policy Bulletin 05.1, "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market

<sup>1</sup> See *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Antidumping Duty Order*, 85 FR 22126 (April 21, 2020) (*Order*).

<sup>2</sup> See Hualing's Letter, "Request for Initiation of a New Shipper Review of the Antidumping Duty Order on *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China* (A-570-106)," dated October 30, 2020 (NSR Request).

<sup>3</sup> *Id.* at Exhibit 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at Exhibit 2.

Accordingly, Commerce will issue questionnaires to Hualing requesting, *inter alia*, information regarding its export activities for the purpose of determining whether it is eligible for a separate rate. The review of the exporter will proceed if the response provides sufficient indication that the exporter is not subject to either *de jure* or *de facto* government control with respect to its exports of wooden cabinets and vanities.

We intend to conduct this NSR in accordance with section 751(a)(2)(B) of the Act.<sup>13</sup> Because Hualing certified that it exported subject merchandise, the sale of which is the basis for its NSR request, Commerce will instruct CBP to continue to suspend liquidation of all entries of subject merchandise exported by Hualing. To assist in its analysis of the *bona fide* nature of Hualing's sale(s), upon initiation of this NSR, Commerce will require Hualing to submit, on an ongoing basis, complete transaction information concerning any sales of subject merchandise to the United States that were made subsequent to the POR.

Interested parties requiring access to proprietary information in this NSR should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306. This initiation notice is published in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

Dated: November 25, 2020.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2020-26479 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-122-858]

#### Certain Softwood Lumber Products From Canada: Final Results of the Countervailing Duty Administrative Review, 2017-2018

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

Economy Countries," available at <http://ia.ita.doc.gov/policy/bull05-1.pdf>.

<sup>13</sup> The Act was amended by the Trade Facilitation and Trade Enforcement Act of 2015 which removed from section 751(a)(2)(B) of the Act the provision directing Commerce to instruct CBP to allow an importer the option of posting a bond or security in lieu of a cash deposit during the pendency of an NSR.

**SUMMARY:** The Department of Commerce (Commerce) determines that producers and exporters of certain softwood lumber products (softwood lumber) from Canada received countervailable subsidies during the period of review, April 28, 2017 through December 31, 2018.

**DATES:** Applicable December 1, 2020.

#### FOR FURTHER INFORMATION CONTACT:

Peter Zukowski (Canfor), Nicholas Czajkowski (JDIL), Kristen Johnson (Resolute), and Laura Griffith (West Fraser), AD/CVD Operations, Offices I and III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-0189, (202) 482-1395, (202) 482-4793, and (202) 482-1167, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

Commerce published the *Preliminary Results* of this administrative review of softwood lumber from Canada on February 7, 2020.<sup>1</sup> For a summary of the events that occurred since the *Preliminary Results* and a full discussion of the issues raised by parties for the final results, *see* the Issues and Decision Memorandum.<sup>2</sup>

On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.<sup>3</sup> On June 3, 2020, Commerce extended the deadline for the final results of this administrative review.<sup>4</sup> On July 21, 2020, Commerce tolled all

<sup>1</sup> See *Certain Softwood Lumber Products from Canada: Preliminary Results and Partial Rescission of the Countervailing Duty Administrative Review; 2017-2018*, 85 FR 7273 (February 7, 2020) (*Preliminary Results*).

<sup>2</sup> See Memorandum, "Issues and Decision Memorandum for the Final Results of Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada; 2017-2018," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum). 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 <https://access.trade.gov> and is available to all parties in the Central Records Unit, room B8024 of the main Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at <http://enforcement.trade.gov/frn/index.html>. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

<sup>3</sup> 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.

<sup>4</sup> See Memorandum, "Certain Softwood Lumber Products from Canada: Extension of Deadline for Final Results of the 2017-2018 Countervailing Duty Administrative Review," dated June 3, 2020.

deadlines in administrative reviews by an additional 60 days.<sup>5</sup> The revised deadline for the final results of this administrative review is now November 23, 2020.

#### Scope of the Order

The product covered by this order is certain softwood lumber products from Canada. For a complete description of the scope of the order, *see* the Issues and Decision Memorandum.

#### Analysis of Subsidy Programs and Comments Received

Commerce conducted this CVD administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). The subsidy programs under review, and the issues raised in case and rebuttal briefs submitted by the interested parties, are discussed in the Issues and Decision Memorandum. A list of the issues that the parties raised, and to which we responded in the Issues and Decision Memorandum, is attached to this notice at Appendix I. 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 <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/index.html>. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Based on our analysis of the comments received from the interested parties, we made changes to the subsidy rates calculated for certain respondents. For a discussion of these changes, *see* the Issues and Decision Memorandum.

#### Companies Not Selected for Individual Review

Because the rates calculated for the companies selected for individual reviewed are above *de minimis* and not based entirely on facts available, we applied a subsidy rate based on a weighted average of the subsidy rates calculated for the reviewed companies using sales data submitted by those companies to calculate a rate for the companies not selected for review. This is consistent with the methodology that we would use in an investigation to establish the all-others rate, pursuant to section 705(c)(5)(A) of the Act. A list of

<sup>5</sup> See Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020.

all non-selected companies is included in Appendix II.

For further information on the calculation of the non-selected rate, *see* “Final *Ad Valorem* Rate for Non-

Selected Companies under Review” in the Issues and Decision Memorandum.

### Final Results of Administrative Review

In accordance with section 751(a)(1)(A) of the Act and 19 CFR

351.221(b)(5), we determine that the following total estimated countervailable subsidy rates exist for 2017 and 2018:

| Companies                                                           | Subsidy rate<br>2017<br><i>ad valorem</i><br>(%) | Subsidy rate<br>2018<br><i>ad valorem</i><br>(%) |
|---------------------------------------------------------------------|--------------------------------------------------|--------------------------------------------------|
| Canfor Corporation and its cross-owned affiliates <sup>6</sup>      | 2.94                                             | 2.63                                             |
| J.D. Irving, Limited and its cross-owned affiliates <sup>7</sup>    | 3.43                                             | 2.66                                             |
| Resolute FP Canada Inc. and its cross-owned affiliates <sup>8</sup> | 18.71                                            | 19.10                                            |
| West Fraser Mills Ltd. and its cross-owned affiliates <sup>9</sup>  | 6.76                                             | 7.57                                             |
| Non-selected Companies                                              | 7.26                                             | 7.42                                             |

### Disclosure

Commerce intends to disclose the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.244(b).

### Assessment Rates

In accordance with 19 CFR 351.212(b)(2), Commerce intends to issue appropriate assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results in the **Federal Register** to liquidate shipments of subject merchandise entered, or withdrawn from warehouse, for consumption for the period on or after April 28, 2017 through December 31, 2017, and for the period on or after January 1, 2018 through December 31, 2018, for the above-listed companies at the *ad valorem* assessment rates listed.

### Cash Deposit Requirements

Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amount calculated for the year 2018 from the companies identified above, on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results in the **Federal Register**, as provided by section 751(a)(2)(C) of the Act. For all non-reviewed companies, we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. Accordingly, the cash deposit rates that will be applied to the

companies covered by this order, but not examined in this review, are those established in the most recently completed segment of the proceeding for each company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

### Notification Regarding Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or 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

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(5).

Dated: November 23, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

### Appendix I

#### List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. List of Issues
- III. Case History
- IV. Period of Review
- V. Scope of the Order

### VI. Subsidies Valuation

### VII. Analysis of Programs

### VIII. Final *Ad Valorem* Rate for Non-Selected Companies Under Review

### IX. Analysis of Comments

Comment 1: Whether Commerce Must Update the Regulations Implementing the NAFTA Prior To Issuance of the Final Results

Comment 2: Whether Commerce

Sufficiently Considered Expert Reports

Comment 3: Whether Commerce Applied Appropriate Standards for *De Facto* and *De Jure* Specificity

Comment 4: Whether Commerce Properly Required Respondents To Report “Other Assistance”

Comment 5: Whether the Purchase of Electricity Is a Purchase of a Good or Service

Comment 6: Attribution of Benefits From the Sale of Electricity

Comment 7: Applying the Benefit-to-the-Recipient Standard to the Purchase of Electricity for MTAR Programs

Comment 8: Whether Electricity Curtailment Programs Are Grants

Comment 9: Revisions to Draft Customs Instructions

Comment 10: Whether Commerce Should Allocate Stumpage Benefits Over Total Sales

Comment 11: Whether Commerce Should Calculate Negative Benefits in the Stumpage for LTAR and LER Programs

Comment 12: Whether the Alberta Stumpage Market Is Distorted

Comment 13: Whether TDA Survey Prices Are an Appropriate Benchmark for Alberta Crown-Origin Stumpage

Comment 14: Whether There Is a Useable Tier-One Benchmark in British Columbia

Comment 15: Whether Commerce Should Revise Its Selection of a U.S. PNW Delivered Log Benchmark Price

Comment 16: Whether Commerce Should Account for GBC’s “Stand as a Whole” Pricing as a Significant “Prevailing Market Condition”

<sup>6</sup> Commerce finds the following companies to be cross-owned with Canfor Corporation: Canadian Forest Products, Ltd., and Canfor Wood Products Marketing, Ltd.

<sup>7</sup> Commerce finds the following companies to be cross-owned with J.D. Irving, Limited: Miramichi Timber Holdings Limited, The New Brunswick

Railway Company, Rothesay Paper Holdings Ltd., and St. George Pulp & Paper Limited.

<sup>8</sup> Commerce finds the following companies to be cross-owned with Resolute: Resolute Growth Canada Inc., Produits Forestiers Maurice S.E.C., Abitibi-Bowater Canada Inc., Bowater Canadian Ltd., and Resolute Forest Products Inc.

<sup>9</sup> Commerce finds the following companies to be cross-owned with West Fraser: West Fraser Timber Co. Ltd., West Fraser Alberta Holdings, Ltd., Blue Ridge Lumber Inc., Manning Forest Products, Ltd., Sunpine Inc., and Sundre Forest Products Inc.

- Comment 17: Whether Private Stumpage Prices in New Brunswick Should be Used as Tier-One Benchmarks
- Comment 18: Whether the Ontario Crown Timber Market Is Distorted
- Comment 19: Whether the Québec Timber Market Is Distorted
- Comment 20: Whether Commerce Should Account for Spruce Budworm Infestation Conditions That Affect Resolute's SDO Sawmill
- Comment 21: Whether Commerce Should Continue To Use a Beetle-Killed Benchmark Price for the Final Results
- Comment 22: Whether Commerce's Selection of a Log Volume Conversion Factor Was Appropriate
- Comment 23: Whether Commerce Should Adjust the BC Log Benchmark Price for Scaling and G&A Costs
- Comment 24: Whether Commerce Should Adjust for Tenure Security in British Columbia
- Comment 25: Whether Private-Origin Standing Timber in Nova Scotia Is Available in the Provinces at Issue
- Comment 26: Whether the Tree Size in Nova Scotia, as Measured by DBH, Is Comparable to Tree Size in Québec, Ontario, and Alberta
- Comment 27: Whether SPF Tree Species in Nova Scotia Are Comparable to SPF Tree Species in the Provinces at Issue
- Comment 28: Whether Nova Scotia's Forest Is Comparable to the Forests of New Brunswick, Québec, Ontario, and Alberta
- Comment 29: Reliability of Nova Scotia Private-Origin Standing Timber Benchmark
- Comment 30: Whether High Demand for Pulplogs in Nova Scotia Creates High Demand for Sawlogs Which Makes Market Conditions for Nova Scotia Sawlogs Incomparable to the Market Conditions of Sawlogs in Other Provinces
- Comment 31: Classification of Timber Purchases in Nova Scotia Compared to Québec, Ontario, and Alberta
- Comment 32: Conversion Factor Used in Nova Scotia Benchmark
- Comment 33: Whether Differences in Nova Scotia's Harvest and Haulage Costs Impact Its Comparability or Require an Adjustment
- Comment 34: Whether Commerce Should Adjust the Nova Scotia Benchmark for Differences in Logging Camp Costs
- Comment 35: Whether Commerce Should Revise the Indexing Method Employed in the Derivation of the Nova Scotia Benchmark
- Comment 36: Whether Commerce Should Revise the Nova Scotia Benchmark To Account for Regional Differences
- Comment 37: Whether To Add a C\$3.00/m<sup>3</sup> Silviculture Fee to the Nova Scotia Benchmark
- Comment 38: Whether Fuelwood Should Be Included in the Stumpage Benefit Calculation
- Comment 39: Whether Commerce Should Account for JDIL's Treelength Purchases in the Stumpage Benefit Calculation
- Comment 40: Whether Commerce Should Revise the Product Comparisons Used in the Stumpage Benefit Calculation To Account for Log Quality
- Comment 41: Whether Commerce Should Revise the Price Comparisons Used in the Stumpage Benefit Calculation Involving Crown-Origin Standing Timber in Québec, Ontario, and Alberta
- Comment 42: Whether Commerce Should Use Log Price Data From the HC Haynes Survey as the Basis for the Nova Scotia Standing Timber Benchmark
- Comment 43: Whether Commerce Should Make Adjustments to Stumpage Rates Paid by the Respondents To Account for "Total Remuneration" in Alberta, New Brunswick, Ontario, and Québec
- Comment 44: Whether Commerce Should Find Restrictions on Log Exports in Alberta, New Brunswick, Ontario, and Québec To Be Countervailable Subsidies
- Comment 45: Whether the LER in British Columbia Results in a Financial Contribution
- Comment 46: Whether the Log Export Restraint Has an Impact in British Columbia
- Comment 47: Whether the U.S. Log Benchmark Is a World Market Price Available in British Columbia
- Comment 48: Whether AESO Electricity Purchases for MTAR Are Countervailable
- Comment 49: Whether BC Hydro EPAs Are Countervailable
- Comment 50: Whether Commerce Applied the Correct Benchmark To Calculate the Benefit Under BC Hydro EPAs
- Comment 51: Whether Commerce's Specificity and Benchmark Analyses for the Ontario and Québec Electricity MTAR Programs Were Arbitrary
- Comment 52: Whether Commerce Applied the Correct Benchmark To Calculate the Benefit Under the IESO CHP III
- Comment 53: Whether Ontario's IESO CHP III Is Specific
- Comment 54: Whether Commerce Correctly Attributed Benefits Under the IESO CHP III Program
- Comment 55: Whether Commerce Applied the Correct Benchmark To Calculate the Benefit Under the PAE 2011–01 Program
- Comment 56: Whether Hydro-Québec's PAE 2011–01 Program Is Specific
- Comment 57: Whether Commerce Correctly Attributed Benefits Under the PAE 2011–01
- Comment 58: Whether the BC ETG/Canada—BC Job Grant Is Specific
- Comment 59: Whether Funds West Fraser Received for a Lignin Plant Through the SDTC, IFIT, and ABF Programs Are Tied to Non-Subject Merchandise
- Comment 60: Whether the Bioenergy Producer Program Is Countervailable
- Comment 61: Whether Payments for Aerial Inventory Photography and LiDar Are Countervailable
- Comment 62: Whether FRPA Section 108 Payments to Canfor Are Countervailable
- Comment 63: Whether the Purchase of Carbon Offsets From Canfor Is Countervailable
- Comment 64: Whether the Miscellaneous Payment From BC Hydro to West Fraser Is Countervailable
- Comment 65: Whether the BC Hydro Power Smart Subprograms Provide a Financial Contribution and Are Specific
- Comment 66: Whether Payments for Cruising and Block Layout Provide a Financial Contribution
- Comment 67: Whether Payments for Fire Suppression Are Countervailable
- Comment 68: Whether the FESBC Payment Is a Countervailable Subsidy
- Comment 69: Whether Commerce Should Continue To Find the Silviculture and License Management Programs Countervailable
- Comment 70: Whether Commerce Should Find the Workforce Expansion Programs To Be Countervailable or Specific
- Comment 71: Whether Ontario's Forest Roads Funding Program Is Countervailable
- Comment 72: Whether Ontario's TargetGHG Is Specific
- Comment 73: Whether Ontario's IESO Demand Response Is Countervailable
- Comment 74: Whether Ontario's IEI Program Is Specific
- Comment 75: Whether Québec's PCIP Confers a Benefit
- Comment 76: Whether Québec's Paix des Braves Confers a Benefit
- Comment 77: Whether Québec's MCRP Confers a Benefit
- Comment 78: Whether Québec's Investment Program in Public Forests Affected by Natural or Anthropogenic Disturbances Confers a Benefit
- Comment 79: Whether Québec's PIB Is Countervailable
- Comment 80: Whether Québec's ÉcoPerformance Is Countervailable
- Comment 81: Whether Québec's FDRCMO and MFOR Are Specific
- Comment 82: Whether Québec's FDRCMO and MFOR Are Recurring
- Comment 83: Whether Hydro-Québec's GDP New Demand-Side Management Program Is Specific and Conferred a Benefit
- Comment 84: Whether Hydro-Québec's IEO Is Specific and Conferred a Benefit
- Comment 85: Whether Hydro-Québec's Electricity Discount Program for Rate L Customers Is Countervailable
- Comment 86: Whether Hydro-Québec's ISEE Is Countervailable
- Comment 87: Whether Hydro-Québec's Special L Rate Is Tied to Pulp and Paper Production
- Comment 88: Whether Hydro-Québec's Special L Rate Conferred a Benefit
- Comment 89: Whether the Federal and Provincial SR&ED Tax Credits Are Specific
- Comment 90: Whether the FLTC and PLTC Are Countervailable
- Comment 91: Whether the Refund for the BC Logging Tax in 2017 Related to Prior Years Is Countervailable
- Comment 92: Whether the ACCA Is *De Jure* Specific
- Comment 93: Whether Commerce Was Correct To Treat the Both the ACCA and Class 1 Additional CCA as Individual Programs
- Comment 94: Whether the AJCTC Is Specific

Comment 95: Whether the Class 1 Additional CCA Program Is Specific

Comment 96: Whether the Class 1 Additional CCA Program Provides a Benefit

Comment 97: Whether Alberta's TEFU and British Columbia's Coloured Fuel Programs Are Countervailable

Comment 98: Whether Schedule D Depreciation Constitutes a Financial Contribution and Confers a Benefit

Comment 99: Whether Schedule D Depreciation Is Specific

Comment 100: Whether the IPTC Is Countervailable

Comment 101: Whether the BC Training Tax Credit Is Specific

Comment 102: Whether Class 9 Farm Property Assessment Rates Are Specific

Comment 103: Whether New Brunswick's Property Tax Incentives for Private Forest Producers Is Countervailable

Comment 104: Whether Commerce Correctly Calculated the Benchmark for New Brunswick's Property Tax Incentives for Private Forest Producers Program

Comment 105: Whether Commerce Omitted JDIL's Program Rate for the Total Capital Cost Allowance for Class 1 Acquisitions Program From JDIL's Total Net Subsidy Rate for 2018

Comment 106: Whether Commerce Should Find LIREPP Countervailable

Comment 107: Whether the Gasoline and Fuel Tax Program Provides a Financial Contribution in the Form of Revenue Forgone or Can Be Found Specific

Comment 108: Whether the OTCMP Is Specific

Comment 109: Whether Québec's Credits for the Construction and Major Repair of Public Access Roads and Bridges in Forest Areas Confer a Benefit

Comment 110: Whether Québec's Refund of Fuel Tax Paid on Fuel Used for Stationary Purposes Is Specific

Comment 111: Whether Québec's Property Tax Refund for Forest Producers on Private Woodlands Confers a Countervailable Benefit

Comment 112: Whether Québec's Tax Credit for Fees and Dues Paid To Research Consortium Is Specific

Comment 113: Whether Benefits of Unaffiliated Suppliers Should Be Cumulated With Canfor's Benefit and Whether Canfor's U.S. Sales of Subject Merchandise Produced by Unaffiliated Suppliers Should Be Included in the Denominator of Canfor's Subsidy Rate Calculation

Comment 114: Whether Commerce Should Include Sales by Cross-Owned Producers of Downstream Products in JDIL's Sales Denominator When Calculating Countervailable Subsidy Rates

Comment 115: Whether Countervailing Road Credit Reimbursements Imposes a Double Remedy

Comment 116: Whether the Contracts Between Resolute and Rexforêt Confer a Benefit

Comment 117: Whether the Benefit of SR&ED Tax Credits Claimed by Resolute Was Extinguished When AbitibiBowater Emerged From Bankruptcy

Comment 118: GOO's Debt Forgiveness of Resolute's Fort Frances Mill

Comment 119: Whether Commerce Should Correct a Clerical Error in Resolute's LER Benefit Calculation

#### X. Recommendation

### Appendix II

#### Non-Selected Exporters/Producers

- 1074712 BC Ltd.
- 5214875 Manitoba Ltd.
- 752615 B.C Ltd, Fraserview Remanufacturing Inc, dba Fraserview Cedar Products.
- 9224–5737 Québec inc. (aka A.G. Bois)
- A.B. Cedar Shingle Inc.
- Absolute Lumber Products, Ltd.
- AJ Forest Products Ltd.
- Alberta Spruce Industries Ltd.
- Aler Forest Products, Ltd.
- Alpa Lumber Mills Inc.
- American Pacific Wood Products
- Anbrook Industries Ltd.
- Andersen Pacific Forest Products Ltd.
- Anglo American Cedar Products Ltd.
- Anglo-American Cedar Products, LTD.
- Antrim Cedar Corporation
- Aquila Cedar Products, Ltd.
- Arbec Lumber Inc.
- Aspen Planers Ltd.
- B&L Forest Products Ltd
- B.B. Pallets Inc.
- Babine Forest Products Limited
- Bakerview Forest Products Inc.
- Bardobec Inc.
- BarretteWood Inc.
- Barrette-Chapais Ltee
- Benoît & Dionne Produits Forestiers Ltee
- Best Quality Cedar Products Ltd.
- Blanchet Multi Concept Inc.
- Blanchette & Blanchette Inc.
- Bois Aise de Montreal inc.
- Bois Bonsai inc.
- Bois Daaquam inc.
- Bois D'œuvre Cedrico Inc. (aka Cedrico Lumber Inc.)
- Bois et Solutions Marketing SPEC, Inc.
- Boisaco
- Boscus Canada Inc.
- BPWood Ltd.
- Bramwood Forest Inc.
- Brunswick Valley Lumber Inc.
- Busque & Laflamme Inc.
- C&C Wood Products Ltd.
- Caledonia Forest Products Inc.
- Campbell River Shake & Shingle Co., Ltd.
- Canadian American Forest Products Ltd.
- Canadian Wood Products Inc.
- Canusa cedar inc.
- Canyon Lumber Company, Ltd.
- Careau Bois inc.
- Carrier & Begin Inc.
- Carrier Forest Products Ltd.
- Carrier Lumber Ltd.
- Cedar Valley Holdings Ltd.
- Cedarline Industries, Ltd.
- Central Cedar Ltd.
- Centurion Lumber, Ltd.
- Clair Industrial Development Corp. Ltd.
- Chaleur Sawmills LP
- Channel-ex Trading Corporation
- Clermond Hamel Ltee
- Coast Clear Wood Ltd.
- Coast Mountain Cedar Products Ltd.
- Commonwealth Plywood Co. Ltd.
- Comox Valley Shakes Ltd.
- Conifex Fibre Marketing Inc.
- Cowichan Lumber Ltd.
- CS Manufacturing Inc., dba Cedarshed
- CWP—Industriel inc.
- CWP—Montreal inc.
- D & D Pallets, Ltd.
- Dakeryn Industries Ltd.
- Decker Lake Forest Products Ltd.
- Delco Forest Products Ltd.
- Delta Cedar Specialties Ltd.
- Devon Lumber Co. Ltd.
- DH Manufacturing Inc.
- Direct Cedar Supplies Ltd.
- Doubletree Forest Products Ltd.
- Downie Timber Ltd.
- Dunkley Lumber Ltd.
- EACOM Timber Corporation
- East Fraser Fiber Co. Ltd.
- Edgewood Forest Products Inc.
- ER Probyn Export Ltd.
- Eric Goguen & Sons Ltd.
- Falcon Lumber Ltd.
- Foothills Forest Products Inc.
- Fornebu Lumber Co. Ltd.
- Fraser Specialty Products Ltd.
- Fraserview Cedar Products
- Furtado Forest Products Ltd.
- G & R Cedar Ltd.
- Galloway Lumber Company Ltd.
- Gilbert Smith Forest Products Ltd.
- Glandell Enterprises Inc.
- Goat Lake Forest Products Ltd.
- Goldband Shake & Shingle Ltd.
- Golden Ears Shingle Ltd.
- Goldwood Industries Ltd.
- Goodfellow Inc.
- Gorman Bros. Lumber Ltd.
- Groupe Crete Chertsey
- Groupe Crete division St-Faustin
- Groupe Lebel inc.
- Groupe Lignarex inc.
- H.J. Crabbe & Sons Ltd.
- Haida Forest Products Ltd.
- Harry Freeman & Son Ltd.
- Hornepayne Lumber LP
- Imperial Cedar Products, Ltd.
- Imperial Shake Co. Ltd.
- Independent Building Materials Dist.
- Interfor Corporation
- Island Cedar Products Ltd
- Ivor Forest Products Ltd.
- J&G Log Works Ltd.
- J.H. Huscroft Ltd.
- Jan Woodland (2001) inc.
- Jhaji Lumber Corporation
- Kalesnikoff Lumber Co. Ltd.
- Kan Wood, Ltd.
- Kebois Ltee/Ltd
- Keystone Timber Ltd.
- Kootenay Innovative Wood Ltd.
- L'Atelier de Readaptation au travail de Beauce Inc.
- Lafontaine Lumber Inc.
- Langevin Forest Products Inc.
- Lecours Lumber Co. Limited
- Ledwidge Lumber Co. Ltd.
- Leisure Lumber Ltd.
- Les Bois d'œuvre Beaudoin Gauthier inc.
- Les Bois Martek Lumber
- Les Bois Traites M.G. Inc.
- Les Chantiers de Chibougamau Ltd.
- Leslie Forest Products Ltd.
- Lignum Forest Products LLP
- Linwood Homes Ltd.
- Longlac Lumber Inc.
- Lulumco inc.

- Magnum Forest Products, Ltd.
- Maibec inc.
- Manitou Forest Products Ltd.
- Marwood Ltd.
- Materiaux Blanchet Inc.
- Matsqui Management and Consulting Services Ltd., dba Canadian Cedar Roofing Depot
- Metrie Canada Ltd.
- Mid Valley Lumber Specialties, Ltd.
- Midway Lumber Mills Ltd.
- Mill & Timber Products Ltd.
- Millar Western Forest Products Ltd.
- MP Atlantic Wood Ltd.
- Multicedre ltee
- Nakina Lumber Inc.
- National Forest Products Ltd.
- New Future Lumber Ltd.
- Nicholson and Cates Ltd
- Norsask Forest Products Limited Partnership
- North American Forest Products Ltd.<sup>10</sup>
- North Enderby Timber Ltd.
- Olympic Industries, Inc./Olympic Industries Inc-Reman Code/Olympic Industries ULC/Olympic Industries ULC-Reman/Olympic Industries ULC-Reman Code
- Pacific Coast Cedar Products Ltd.
- Pacific Pallet, Ltd.
- Pacific Western Wood Works Ltd.
- Parallel Wood Products Ltd.
- Pat Power Forest Products Corporation
- Phoenix Forest Products Inc.
- Pine Ideas Ltd.
- Pioneer Pallet & Lumber Ltd
- Porcupine Wood Products Ltd.
- Power Wood Corp.
- Precision Cedar Products Corp.
- Prendiville Industries Ltd. (aka Kenora Forest Products)
- Produits Forestiers Mauricie
- Produits Forestiers Petit Paris
- Produits forestiers Temrex, s.e.c.
- Produits Matra Inc. and Sechoirs de Beauce Inc.<sup>11</sup>
- Promoboys G.D.S. inc.
- Rayonier A.M. Canada GP
- Rembos Inc.
- Rene Bernard Inc.
- Richard Lutes Cedar Inc.
- Rielly Industrial Lumber Inc.
- S & K Cedar Products Ltd.
- S&R Sawmills Ltd
- S&W Forest Products Ltd.
- San Industries Ltd.
- Sawarne Lumber Co. Ltd.
- Scierie St-Michel inc.
- Scierie West Brome Inc.
- Scotsburn Lumber Co. Ltd.
- Serpentine Cedar Ltd.
- Serpentine Cedar Roofing Ltd.
- Sexton Lumber Co. Ltd.
- Sigurdson Forest Products Ltd.
- Silvaris Corporation

- Silver Creek Premium Products Ltd.
- Sinclair Group Forest Products Ltd.
- Skana Forest Products Ltd.
- Skeena Sawmills Ltd
- Sound Spars Enterprise Ltd.
- South Beach Trading Inc.
- Spécialiste du Bardeau de Cedre Inc
- Spruceland Millworks Inc.
- Surrey Cedar Ltd.
- T.G. Wood Products, Ltd
- Taan Forest Products
- Taiga Building Products Ltd.
- Tall Tree Lumber Company
- Teal Cedar Products Ltd.
- Tembec Inc.
- Terminal Forest Products Ltd.
- The Teal-Jones Group
- The Wood Source Inc.
- Tolko Marketing and Sales Ltd.<sup>12</sup>
- Trans-Pacific Trading Ltd.
- Triad Forest Products Ltd.
- Twin Rivers Paper Co. Inc.
- Tyee Timber Products Ltd.
- Universal Lumber Sales Ltd.
- Usine Sartigan Inc.
- Vaagen Fibre Canada, ULC
- Valley Cedar 2 ULC
- Vancouver Island Shingle, Ltd.
- Vancouver Specialty Cedar Products Ltd.
- Visscher Lumber Inc
- W.I. Woodtone Industries Inc.
- Waldun Forest Product Sales Ltd.
- Waldun Forest Products Ltd.
- Watkins Sawmills Ltd.
- West Bay Forest Products Ltd.
- West Wind Hardwood Inc.
- Western Forest Products Inc.
- Western Lumber Sales Limited
- Western Wood Preservers Ltd.
- Weston Forest Products Inc.
- Westrend Exteriors Inc.
- Weyerhaeuser Co.
- White River Forest Products L.P.
- Winton Homes Ltd.
- Woodline Forest Products Ltd.
- Woodstock Forest Products
- Woodtone Specialties Inc.
- Yarrow Wood Ltd.

[FR Doc. 2020-26451 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-570-132]

#### Twist Ties From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of twist ties from the People's Republic of China (China). The period of investigation is January 1, 2019 through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

**DATES:** Applicable December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Ajay Menon or Adam Simons, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-1993 or (202) 482-6172, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce initiated this investigation on July 16, 2020.<sup>1</sup> On September 1, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is November 23, 2020.<sup>2</sup> For a complete description of events following the initiation of this investigation, see the Preliminary Decision Memorandum.<sup>3</sup> A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <http://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/>. The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

<sup>1</sup> See *Twist Ties from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 85 FR 45188 (July 27, 2020) (Initiation Notice).

<sup>2</sup> See *Twist Ties from the People's Republic of China: Postponement of Preliminary Determination of Antidumping Duty Investigation*, 85 FR 54352 (September 1, 2020).

<sup>3</sup> See Memorandum, "Decision Memorandum for the Affirmative Preliminary Determination of the Countervailing Duty Investigation of Twist Ties from the People's Republic of China," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

<sup>10</sup> North American Forest Products Ltd. is located in Abbotsford, British Columbia. Imports of softwood lumber produced and exported by North American Forest Products Ltd. of Saint-Quentin, New Brunswick, which is a separate entity, have been excluded from the CVD order.

<sup>11</sup> In the Expedited Review, Commerce found these companies to be cross-owned. See *Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Expedited Review*, 84 FR 32121, 32122 (July 5, 2019).

<sup>12</sup> In the underlying investigation, Commerce found the following companies to be cross-owned with Tolko Marketing and Sales Ltd.: Tolko Industries Ltd. and Meadow Lake OSB Limited Partnership. See *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814, 51816 (November 8, 2017).



## Scope of the Investigation

The product covered by this investigation is twist ties 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,<sup>4</sup> the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, scope).<sup>5</sup> 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 preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.<sup>6</sup> Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice* to exclude twist ties packaged with bags for sale together where the quantity of twist ties does not exceed twice the number of bags in each package. Commerce is also excluding twist ties that are part of the packaging of the imported product.

## Methodology

Commerce is conducting this investigation in accordance with section 701 of the Act. For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.*, a financial contribution by an "authority" that gives rise to a benefit to the recipient, and that the subsidy is specific.<sup>7</sup>

Commerce notes that, in making these findings, it relied, in part, on facts available and, because it finds that one or more respondents did not act to the best of their ability to respond to Commerce's requests for information, it drew an adverse inference where appropriate in selecting from among the facts otherwise available.<sup>8</sup> For further information, *see* "Use of Facts Otherwise Available and Adverse

Inferences" in the Preliminary Decision Memorandum.

## Alignment

As noted in the Preliminary Decision Memorandum, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), Commerce is aligning the final countervailing duty (CVD) determination in this investigation with the final determination in the companion antidumping duty (AD) investigation of twist ties from China based on a request made by the petitioner.<sup>9</sup> Consequently, the final CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than February 16, 2020, unless postponed.

## All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act.

Pursuant to section 705(c)(5)(A)(ii) of the Act, if the individual estimated countervailable subsidy rates established for all exporters and producers individually examined are zero, *de minimis* or determined based entirely on facts otherwise available, Commerce may use "any reasonable method" to establish the estimated subsidy rate for all-other producers or exporters. In this investigation, Commerce preliminarily determined the individually estimated subsidy rate for each of the individually examined respondents based entirely on facts available under section 776 of the Act. Consequently, pursuant to sections 703(d) and 705(c)(5)(A)(ii) of the Act, we established the all-others rate by applying the countervailable subsidy rate assigned to the mandatory respondents.

## Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

<sup>9</sup> See Petitioner's Letter, "Twist Ties from the People's Republic of China: Request to Align Final Countervailing Duty Determination with the Companion Antidumping Duty Final Determination," dated August 27, 2020.

| Company                                                | Subsidy rate (percent) |
|--------------------------------------------------------|------------------------|
| Dongguan Guanqiao Industrial Co., Ltd .....            | 122.5                  |
| Foshan Shunde Ronggui Yingli Industrial Co., Ltd ..... | 122.5                  |
| Yiwu Kurui Handicraft Co. Ltd ....                     | 122.5                  |
| Zhenjiang Hongda Commodity Co. Ltd .....               | 122.5                  |
| Zhenjiang Zhonglian I/E Co., Ltd .....                 | 122.5                  |
| All Others .....                                       | 122.5                  |

## Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

## Disclosure

Normally, Commerce discloses its calculations performed in connection with the preliminary determination to interested parties 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). However, because Commerce preliminarily applied total AFA rates in the calculation of the benefit for the non-responsive companies, and the applied AFA rates are based on rates calculated in prior proceedings, there are no calculations to disclose.

## Verification

Because the examined respondents in this investigation did not provide information requested by Commerce and Commerce preliminarily determines each of the examined respondents to have been uncooperative, it will not conduct verification.

## Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than 21 days after the date of publication of the preliminary determination. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.<sup>10</sup> Pursuant to 19 CFR

<sup>10</sup> See 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

<sup>4</sup> See *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997).

<sup>5</sup> See *Initiation Notice*.

<sup>6</sup> See Memorandum, "Antidumping and Countervailing Duty Investigations of Twist Ties from the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determination," dated concurrently with this notice (Preliminary Scope Decision Memorandum).

<sup>7</sup> See sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

<sup>8</sup> See sections 776(a) and (b) of the Act.



351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at 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 are reminded that briefs and hearing requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.<sup>11</sup>

### International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

### Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: November 23, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

### Appendix I—Scope of the Investigation

The merchandise covered by this investigation consists of twist ties, which are thin, bendable ties for closing containers, such as bags, bundle items, or identifying objects. A twist tie in most circumstances is comprised of one or more metal wires encased in a covering material, which allows the tie to retain its shape and bind against itself. However, it is possible to make a twist tie with plastic and no metal wires. The metal wire that is generally used in a twist tie is stainless or galvanized steel and typically measures between the gauges of 19 (.0410" diameter) and 31 (.0132") (American Standard Wire Gauge). A twist tie usually has a width between .075" and 1" in the cross-machine direction (width of the tie—measurement perpendicular with the wire); a thickness between .015" and .045" over the wire; and a thickness between .002" and .020" in areas without wire. The scope includes an all-plastic twist tie containing a plastic core as well as a plastic covering (the wing) over the core, just like paper and/or plastic in a metal tie. An all-plastic twist tie (without metal wire) would be of the same measurements as a twist tie containing one or more metal wires. Twist ties are commonly available individually in pre-cut lengths ("singles"), wound in large spools to be cut later by machine or hand, or in perforated sheets of spooled or single twist ties that are later slit by machine or by hand ("gangs").

The covering material of a twist tie may be paper (metallic or plain), or plastic, and can be dyed in a variety of colors with or without printing. A twist tie may have the same covering material on both sides or one side of paper and one side of plastic. When comprised of two sides of paper, the paper material is bound together with an adhesive or plastic. A twist tie may also have a tag or label attached to it or a pre-applied adhesive attached to it.

Excluded from the scope of the order are twist ties packaged with bags for sale together where the quantity of twist ties does not exceed twice the number of bags in each package. Also excluded are twists ties that constitute part of the packaging of the imported product, for example, merchandise anchored/secured to a backing with twist ties in the retail package or a bag of bread that is closed with a twist tie.

Twist ties are imported into the United States under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 8309.90.0000 and 5609.00.3000. Subject merchandise may also enter under HTSUS subheadings 3920.51.5000, 3923.90.0080, 3926.90.9990, 4811.59.6000, 4821.10.2000, 4821.10.4000, 4821.90.2000, 4821.90.4000, and 4823.90.8600. These HTSUS subheadings are provided for reference only. The written description of the scope of the investigation is dispositive.

### Appendix II—List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Investigation
- IV. Injury Test
- V. Diversification of China's Economy
- VI. Use of Facts Otherwise Available and Adverse Inferences
- VII. Analysis of Programs
- VIII. Recommendation

[FR Doc. 2020–26452 Filed 11–30–20; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–552–801]

### Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Continuation of Antidumping Duty Order

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam) would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD order.

**DATES:** Applicable December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Javier Barrientos, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2243.

### SUPPLEMENTARY INFORMATION:

#### Background

On August 12, 2003, Commerce published the AD order on fish fillets from Vietnam.<sup>1</sup>

On October 1, 2019, Commerce published the *Notice of Initiation* of the five-year review of the AD order on fish fillets from Vietnam, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).<sup>2</sup> Commerce

<sup>1</sup> See *Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 47909 (August 12, 2003) (Order).

<sup>2</sup> See *Initiation of Five-Year (Sunset) Reviews*, 84 FR 52067 (October 1, 2019) (*Notice of Initiation*).

<sup>11</sup> See *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19; Extension of Effective Period*, 85 FR 41363 (July 10, 2020).

conducted this sunset review on an expedited basis, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), because it received a complete, timely, and adequate response from domestic interested parties,<sup>3</sup> but no substantive response from respondent interested parties. As a result of its review, Commerce determined that revocation of the *Order* would likely lead to continuation or recurrence of dumping. Commerce also notified the ITC of the magnitude of the dumping margins likely to prevail should the *Order* be revoked.<sup>4</sup> On November 24, 2020, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Order* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>5</sup>

### Scope of the Order

The product covered by the *Order* is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius bocourti*, *Pangasius hypophthalmus* (also known as *Pangasius pangasius*) and *Pangasius micronemus*.

Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact (“regular” fillets), boneless fillets with the belly flap removed (“shank” fillets) and boneless shank fillets cut into strips (“fillet strips/finger”), which include fillets cut into strips, chunks, blocks, skewers, or any other shape.

Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole, dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps.

The subject merchandise will be hereinafter referred to as frozen “basa” and “tra” fillets, which are the

Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 0304.29.6033, 0304.62.0020, 0305.59.0000, 0305.59.4000, 1604.19.2000, 1604.19.2100, 1604.19.3000, 1604.19.3100, 1604.19.4000, 1604.19.4100, 1604.19.5000, 1604.19.5100, 1604.19.6100 and 1604.19.8100 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States (HTSUS).

The *Order* covers all frozen fish fillets meeting the above specifications, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the *Order* is dispositive.

### Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Order* on fish fillets from Vietnam.

U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next sunset review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

### Notification to Interested Parties

This five-year sunset review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: November 24, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2020–26503 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### National Conference on Weights and Measures Annual and Interim Meeting

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice.

**SUMMARY:** The combined 105th Annual and 2021 Interim Meeting of the National Conference on Weights and Measures (NCWM) will be held using a virtual meeting platform and in-person at the Sirata Beach Hotel & Conference Center, St. Pete Beach, Florida, from Sunday, January 10, 2021, through Friday, January 15, 2021. This notice contains information about significant items on the NCWM Committee agendas but does not include all agenda items. As a result, the items are not consecutively numbered.

**DATES:** The 105th Annual Meeting will be held from Sunday, January 10, 2021, through Tuesday, January 12, 2021. The 2021 Interim Meeting will follow on Wednesday, January 13, 2021 through Friday, January 15, 2021. The meeting schedule will be available on the NCWM website at [www.ncwm.com](http://www.ncwm.com).

**ADDRESSES:** This meeting will be held using a virtual meeting platform and in-person at the Sirata Beach Hotel & Conference Center, St. Pete Beach, Florida.

**FOR FURTHER INFORMATION CONTACT:** Dr. Douglas Olson, NIST, Office of Weights and Measures, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899–2600. You may also contact Dr. Olson at (301) 975–2956 or by email at [douglas.olson@nist.gov](mailto:douglas.olson@nist.gov). The meeting is open to the public, but a paid registration is required. Please see the NCWM website ([www.ncwm.net](http://www.ncwm.net)) to view the meeting agendas, registration forms, and hotel reservation information.

### SUPPLEMENTARY INFORMATION:

Publication of this notice on the NCWM’s behalf is undertaken as a public service and does not itself constitute an endorsement by the National Institute of Standards and Technology (NIST) of the content of the notice. NIST participates in the NCWM as an NCWM member and pursuant to 15 U.S.C. 272(b)(10) and (c)(4) and in accordance with Federal policy (e.g., OMB Circular A–119 “Federal Participation in the Development and Use of Voluntary Consensus Standards”).

The NCWM is an organization of weights and measures officials of the

<sup>3</sup> The domestic interested parties are the Catfish Farmers of America and individual U.S. catfish processors: America’s Catch, Inc.; Alabama Catfish, LLC d/b/a Harvest Select Catfish, Inc.; Consolidated Catfish Companies, LLC d/b/a Country Select Catfish; Delta Pride Catfish, Inc.; Guidry’s Catfish, Inc.; Heartland Catfish Company; Magnolia Processing, Inc. d/b/a Pride of the Pond; and Simmons Farm Raised Catfish, Inc.

<sup>4</sup> See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order*, 85 FR 6500 (February 5, 2020).

<sup>5</sup> See *Certain Frozen Fish Fillets from Vietnam*, 85 FR 75034 (November 24, 2020); see also *Certain Frozen Fish Fillets from Vietnam*, Inv. No. 731–TA–1012 (Third Review), USITC Pub. 5135, dated November 2020.

states, counties, and cities of the United States, and representatives from the private sector and federal regulatory agencies. These meetings can bring these government officials together with representatives of business, industry, trade associations, and consumer organizations to discuss proposed laws and regulations and other subjects related to the field of weights and measures technology, administration, and enforcement. NIST hosted the first meeting of the NCWM in 1905. Since then, the conference has provided a model of cooperation between Federal, State and local governments and the private sector. NIST participates to encourage cooperation between federal agencies and the states in the development of legal metrology requirements. NIST also promotes uniformity in state laws, regulations, and testing procedures used in the regulatory control of commercial weighing and measuring devices, packaged goods, and for other trade and commerce issues.

The NCWM has established multiple committees, task groups, and other working bodies to address legal metrology issues of interest to regulatory officials, industry, consumers, and others. The following are brief descriptions of some of the significant agenda items that will be considered by some of the NCWM Committees at the NCWM Annual and Interim Meetings. Comments will be taken on these and other issues during several public comment sessions. At this stage, the items are proposals.

This meeting also includes work sessions in which the Committees may also accept comments, and where recommendations will be developed for consideration and possible adoption at the NCWM 2020 (105th Annual Meeting) and NCWM 2021 Annual Meeting. The Committees may withdraw or carryover items that need additional development.

These notices are intended to make interested parties aware of these development projects and to make them aware that reports on the status of the project will be given at the Interim Meeting. The notices are also presented to invite the participation of manufacturers, experts, consumers, users, and others who may be interested in these efforts.

The Specifications and Tolerances Committee (S&T Committee) will consider proposed amendments to NIST Handbook 44, "Specifications, Tolerances, and other Technical Requirements for Weighing and Measuring Devices" (NIST HB 44). Those items address weighing and

measuring devices used in commercial applications, that is, devices that are used to buy from or sell to the public or used for determining the quantity of products or services sold among businesses. Issues on the agenda of the NCWM Laws and Regulations Committee (L&R Committee) relate to proposals to amend NIST Handbook 130, "Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality" (NIST HB 130) and NIST Handbook 133, "Checking the Net Contents of Packaged Goods" (NIST HB 133).

#### **NCWM S&T Committee (S&T 105th Annual and Interim Meeting)**

The following items are proposals to amend NIST HB 44:

##### *GEN—General Code*

#### **Item GEN–21.1 Use-for-Fee Vehicle and Axle-Load Scales**

The S&T Committee will consider a new proposal submitted as a recommended Developing Item. This proposal seeks to develop changes to NIST HB 44's General Code and/or Scales Code that will clarify if charging a fee for conducting a weighing operation on a scale constitutes commercial use of the device regardless of whether or not the weight obtained from that weighing operation is used in a commercial transaction. If this is determined to constitute commercial use, then it is hoped the following questions can be answered through the development process of this proposal:

1. Is it permissible to use a vehicle scale to determine the axle load(s), axle-group load(s), and total weight of a vehicle when the length of that vehicle exceeds the length of the scale's load-receiving element and must therefore be weighed in multiple drafts?

2. Is it permissible to use an axle-load scale to determine total vehicle weight (often referred to as "gross vehicle weight") by weighing the different axles and axle groups individually and then summing them, when the only use of the total vehicle weight is for non-commercial purposes, e.g., to verify compliance with state and federal highway legal load limits?

3. What is an appropriate format for the recording of values corresponding to a vehicle's axle and axle-group loads and total vehicle weight?

An important consideration in answering question 1 is the different approach requirements specified in NIST HB 44 for vehicle scales versus axle-load scales and the reasons for those requirements.

The submitter is soliciting input from stakeholders that will help resolve any

questions or confusion associated with this item.

##### *SCL—Scales Code*

#### **Item SCL–20.10 S.1.2.2.2. Class I and II Scales Used in Direct Sale and S.1.2.2.3. Deactivation of a "d" Resolution**

The S&T Committee will consider a proposal to eliminate two current specification requirements in the Scales Code of NIST HB 44. This proposal recommends the deletion of paragraph S.1.2.2.2. "Class I and II Scales Used in Direct Sales" which requires the verifications scale division (e) and scale division (d) to be equal on Class I and II scales used in a direct sale application for scales installed as of January 1, 2020. This requirement would become enforceable to all Class I and II scales used in a direct sale application on January 1, 2023. A direct sale application is one in which both parties in the transaction are present when the quantity is being determined. The second requirement proposed for deletion is paragraph S.1.2.2.3. "Deactivation of a "d" Resolution" which prohibits the simple deactivation of the "d" resolution when the values of "e" and "d" are different on a Class I or II scale if such action affects the scale's ability to round digital values to the nearest minimum unit that can be indicated or recorded. When these two scale increments (identified as "e" and "d") are different, two different levels of the scale's resolution are established. The variation in scale divisions within a scale's capacity range will produce either a lesser, or a greater resolution in the representation of values for loads applied to the scale. According to NIST HB 44, when these division values aren't equal on Class II scales, the value of "e" is required to be larger than the value of "d."

#### **Item SCL–17.1 S.1.8.5. Recorded Representations, Point of Sale Systems, Appendix D—Definitions: Tare**

The S&T Committee will consider a proposal requiring additional sales information to be recorded by cash registers interfaced with a weighing element for items that are weighed at a checkout stand. These systems are currently required to record the net weight, unit price, total price, and the product class, or in a system equipped with price look-up capability, the product name or code number. The change proposed would add "tare weight" to the sales information currently required. Additional changes to this proposal made recently by the NCWM S&T Committee established a

new enforcement date of January 1, 2024 for the proposed requirement. The Committee also added a footnote that had been omitted in a previous version. If the proposal is adopted, the additional information (*i.e.*, the tare weight) would be required to appear on the sales receipt for items weighed at a checkout stand (Point of Sale Systems) on equipment installed in commercial service as of January 1, 2024. This proposed change would not affect equipment already in service.

#### SCL–20.13 N.1.5. Discrimination Test

The S&T Committee will consider a proposal that provides an exemption to conducting a discrimination test on digital electronic scales of Accuracy Class I and II in which the verification scale division (e) equals the displayed scale division (d) and is less than 5 mg. The proposal calls into question the practicality of conducting a discrimination test on such scales citing the need for excessively small denominations of test weights (*i.e.*, decimal milligrams) and questioning whether the test can be successfully conducted in an environment where conditions are not strictly controlled.

#### Item SCL–16.1

##### Sections Throughout the Code To Include Provisions for Commercial Weigh-In-Motion (WIM) Vehicle Scale Systems

The S&T Committee will consider a proposal to amend various sections of the Scales Code of NIST HB 44 to address WIM vehicle scale systems used for commercial applications. This “carry-over” item has appeared on the S&T Committee’s agenda since 2016. An NCWM Task Group (TG) was formed in 2016 at the request of the S&T Committee to consider a proposal that would have expanded the NIST HB 44, Weigh-In-Motion Systems Used for Vehicle Enforcement Screening—Tentative Code to also apply to legal-for-trade (commercial) and law enforcement applications. Members of the TG later agreed that commercial application of WIM vehicle scale systems should be addressed by the Scales Code of NIST HB 44, rather than the Weigh-In-Motion Systems Used for Vehicle Enforcement Screening—Tentative Code. Members of the TG agreed in 2016 to eliminate from the proposal any mention of a law enforcement application and focus solely on WIM vehicle scale systems intended for use in commercial applications. The TG is made up of representatives of WIM equipment manufacturers, NIST Office of Weights and Measures, NCWM, state weights

and measures agencies, and others. The most recent activity by the TG has focused on obtaining evidence supporting the claims of WIM scale manufacturers regarding the performance capabilities of these devices. The TG has requested this evidence to indicate whether devices being manufactured at this time can comply with commercial device tolerances applied to comparable static-weighing devices. The submitter of this proposal (a WIM manufacturer) has initiated a process where preliminary testing can be done to provide the TG with data to substantiate the claims regarding device performance.

An additional focus of the TG, since its formation in 2016, has been to concentrate on the development of appropriate official test procedures used to verify the accuracy of a WIM vehicle scale system. Important factors in this discussion have been that a variety of axle and tandem axle configurations on vehicles will typically be weighed by a WIM system and that a proposed tolerance of 0.2 percent on gross (total) vehicle weight would be applied as maintenance tolerance. The TG provided an update on its development of this item at the 2019 NCWM Interim Meeting. Mr. Tim Chesser (Arkansas), (and co-chair of the WIM TG), recommended the S&T Committee assign the item, returning it to the TG. The Committee agreed to recommend the item be assigned to the TG.

#### Item SCL–20.12

##### Multiple Sections To Add Vehicle Weigh-in-Motion to the Code and Appendix D—Definitions; Vehicle Scale and Weigh-in-Motion Vehicle Scale

The S&T Committee will consider a proposal that would amend multiple sections in NIST HB 44 Scales Code so that they could be applied to WIM vehicle scales. This proposal is similar to Item SCL–16.1. that also appears on the agenda, however, this proposal would only permit commercial weights from WIM equipment when the vehicles are weighed in a single draft and would not permit the summing of axle loads or axle-group loads to determine a gross (total) vehicle weight. The submitter of this proposal provided an opportunity for several state regulatory officials, as well as technical staff from NCWM and NIST Office of Weights and Measures to witness testing performed on a single-draft weigh-in-motion (WIM) vehicle scale. That demonstration provided evidence that this type of system may be capable of complying with current NIST HB 44 Class III L tolerances.

#### SCL–19.2 UR.5. Coupled-in-Motion Railroad Weighing Systems

*Definitions:* Point-based railroad weighing systems.

This proposal to amend the Scales Code of NIST HB 44 to permit use of “point-based” in-motion railroad weighing systems in commercial applications replaces one from the same submitter that appeared on the Committee’s agenda in 2018. This proposal is intended to serve the same purpose as the earlier proposal, however, many of the changes in the previous version have been deleted. The proposal under current consideration by the S&T Committee includes only the following two recommended changes to NIST HB 44:

- Add a new subpart (b) to existing Scales Code paragraph UR.5. Coupled-in-Motion Railroad Weighing Systems that requires the user of dynamic weighing systems for railway cars to provide a static-weighing scale deemed suitable by the statutory authority for use as a reference scale when testing the coupled-in-motion railroad scale.

- Add a new definition for “point-based railroad weighing systems” in Appendix D—Definitions.

#### MDM–20.1 S.1.3. Negative Values, S.1.6. Customer Indications and Recorded Representations, S.1.7. Minimum Measurement, S.1.8. Indications Below Minimum and Above Maximum, S.2. Design of Zero Tare and Appendix D—Definitions: Dimensional Offset

The S&T Committee will consider a proposal to replace the term “tare” with a more accurate descriptive term “dimensional offset” throughout the NIST HB 44 Multiple Dimension Measuring Devices Code. A new definition for the term “dimensional offset” is also proposed for addition to NIST HB 44 Appendix D—Definitions. The submitter of this proposal (The NTEP Multiple Dimension Measuring Device Work Group) prefers the use of “dimensional offset” since the term “tare” implies that a specific (measured/ weighed) value is subtracted from a total measured value to arrive at a net value. Exclusion of the conveyance material (*e.g.*, pallet, skid, etc.) containing an object to be measured by a multiple dimension measuring device is not a subtractive function of the device and the term “dimensional offset” is a more accurate descriptive term to use.

*LMD—Liquid Measuring Devices***Block 4 Items Electronically Captured Tickets or Receipts**

The S&T Committee will consider a proposal to amend NIST HB 44 General Code (Section 1.10.) paragraph G–S.5.6. Recorded Representations and numerous additional paragraphs throughout the Liquid-Measuring Devices Code (Section 3.30.), Vehicle-Tank Meters Code (Section 3.31.), LPG and Anhydrous Ammonia Liquid-Measuring Devices Code (Section 3.32.), Cryogenic Liquid-Measuring Devices Code (Section 3.34.), Mass Flow Meters Code (Section 3.37.), Carbon Dioxide Liquid-Measuring Devices Code (Section 3.38.), and the Hydrogen Gas-Measuring Devices Code (Section 3.39.) to allow recorded values to be captured electronically as an option to receive either a printed ticket or printed receipt. Changes to the definitions of “recorded representation” and “recording element” in Appendix D of NIST HB 44 are also proposed.

**Block 5 Items Category 3 Method of Sealing**

The S&T Committee will consider proposals to permit the use of an electronic log in lieu of a printed copy of a Category 3 sealing method on liquid measuring devices. The current “Category 3” sealing requirements in NIST HB 44 Liquid-Measuring Devices Code (Section 3.30.) specify that a printed copy of an event logger must be available on demand through the device or through another on-site device and that the information may also be available electronically. The new proposal would amend the language in Table S.2.2. “Categories of Device and Methods of Sealing” of the Liquid-Measuring Devices Code (Section 3.30.) to permit either a printed or electronic form of the event logger to be made available.

*VTM—Vehicle Tank Meters***VTM–18.1 S.3.1.1. Means for Clearing the Discharge Hose and UR.2.6. Clearing the Discharge Hose**

The S&T Committee will again consider this carry-over item that proposes to provide specifications and user requirements for manifold flush systems designed to eliminate product contamination on VTMs used for multiple products. This proposal would add specifications on the design of VTMs under S.3.1.1. “Means for Clearing the Discharge Hose.” and add a new user requirement UR.2.6. “Clearing the Discharge Hose.” During open hearings of previous NCWM

meetings, comments were heard about the design of any system to clear the discharge hose of a product prior to the delivery of a subsequent product which could provide opportunities to fraudulently use this type of system.

*EVF—Electric Vehicle Fueling Systems***EVF–20.1 S.1.3.2. EVSE Value of the Smallest Unit**

The S&T Committee will consider a proposal that would specify the maximum value of the indicated and/or recorded electrical energy unit used in an EVSE (Electric Vehicle Supply Equipment). This proposal would reduce (by a factor of 10) the current specified values of these units. The current maximum values of 0.005 MJ and 0.001 kWh would be changed to 0.0005 MJ and 0.0001 kWh respectively. The submitters contend that testing of these systems would be expedited through these changes and reduce the amount of time necessary to complete official tests.

*GMA—Grain Moisture Meters 5.56.(A)***GMA–19.1 Table T.2.1. Acceptance and Maintenance Tolerances Air Oven Method for All Grains and Oil Seeds**

The S&T Committee will consider a proposal that would reduce the tolerances for the air oven reference method. The proposed new tolerances would apply to all types of grains and oil seeds. This item is a carry-over proposal from 2019 and would replace the contents of Table T.2.1. with new criteria. Additional inspection data will be collected and reviewed to assess whether or not the proposed change to the tolerances are appropriate.

**GMA–20.1 S.2.5. Provision for Sealing**

The S&T Committee will consider a proposal to correct an error caused by a 2019 amendment to the sealing requirements for grain moisture meters in Section 5.56.(a) of the Grain Moisture Meters Code. The proposal retains the sealing table in the 2018 version of the Code and adds a new paragraph S.2.5.1., which addresses the sealing requirements for grain moisture meters manufactured as of January 1, 2020.

*TMS/TNMS—Taxi Meters and Transportation Network Measurement Systems***BLOCK 3 Items**

The S&T Committee will consider changes included in this block affecting the NIST HB 44 Taximeters Code (Section 5.54.) and the Transportation Network Measurement Systems (TNMS) Code (Section 5.60.) that would amend the value of tolerances allowed for

distance tests. The changes proposed in this item would change the Taximeters Code requirement T.1.1. “On Distance Tests” by increasing that tolerance to 2.5% when the test exceeds one mile. The change to the TNMS Code affects requirement T.1.1. “Distance Tests” by reducing the tolerance allowed on overregistration under T.1.1.(a) from the current 2.5% to 1% when the test does not exceed one mile and would increase the tolerance for underregistration in T.1.1.(b) from 2.5% to 4%. These changes if adopted would align the tolerances values for distance tests allowed for taximeters and TNMS.

**NCWM L&R Committee**

Issues on the 105th Annual agenda of the NCWM Laws and Regulations Committee (L&R Committee) relate to proposals to amend NIST HB 130.

The following items are proposals to consider amending NIST HB 130:

Item MOS–20.3—NIST HB 130, Uniform Method of Sale, Diesel Fuel. The L&R Committee will consider a proposal to add similar language for diesel fuel that is currently within the Uniform Fuels and Automotive Lubricants Regulations. There are some states that may only adopt one of the regulations that are within NIST HB 130.

Item Block B2: MOS–20.1—NIST HB 130, Uniform Method of Sale, Section 2.39. Tractor Hydraulic Fluid and FLR–20.1. Uniform Fuels and Automotive Lubricants Regulation, Sections 1.31. Hydraulic Fluid, 2.22. Products for Use in Lubricating Tractors and 3.17. Tractor Hydraulic Fluid. The Committee will consider amending recently adopted language on tractor hydraulic fluids. This proposal will add language to improve labeling required for the cautionary statement and distinguish hydraulic fluids.

Item Block B3: FLL–18.1—NIST HB 130, Uniform Fuels and Automotive Lubricants Inspection Law, Section 8. Prohibited Acts, MOS 18.1. Uniform Method of Sale of Commodities Regulation, Section 2.33 Oil, and FLR–18.1. Uniform Fuels and Lubricants Automotive Lubricants Regulation, Section 2.14. Engine (Motor) Oil, 3.13. Oil and 7.2. Reproducibility. This proposal is to amend various regulations within NIST HB 130 to provide modifications to existing regulations to protect consumers from purchasing obsolete motor oils that can harm modern engines.

Item FLR–20.5—NIST HB 130, Uniform Fuels and Automotive Lubricants, Section 2.1.2.(a). Gasoline-Ethanol Blends. This proposal would modify the existing handbook regulation

to add the language, “containing at least 9 and not more than 15 volume percent ethanol.” This language aligns with EPA 40 CFR 80.27(d).

Issues on the 2021 Interim agenda of the NCWM Laws and Regulations Committee (L&R Committee) relate to proposals to amend NIST HB 130 and NIST HB 133.

The following items are proposals for modifying NIST HB 130 and NIST HB 133:

Item Block (B1). – HB 130, PAL–19.1. UPLR, Sec. 2.8. Multiunit Package. NET–19.2. NIST HB 133, Modify “scope” for Chapters 2 thru 4, add a note following Sections 2.3.7.1. and 2.7.3., NET–19.3., and create a Chapter 5. Specialized Test Procedures in NIST HB 133. The L&R Committee will also be addressing a proposal to include adoption of a test procedure for the total quantity declaration on multiunit or variety packages. In addition, in NIST HB 130, Uniform Packaging and Labeling Regulation, the proposal would clarify Section 2.8. Multiunit.

The following items are proposals for modifying NIST HB 130 Uniform Method of Sale (MOS) and the Uniform Fuels and Automotive Lubricants Regulation (FLR):

Item Block (B4)—The Fuels and Lubricants Subcommittee will consider modifications to the MOS Regulation, Section 2.20.2. Documentation for Dispenser Labeling Purposes and the FLR Regulation for Section 1.23. Ethanol Flex Fuel, 2.1.2.(b) Gasoline-Ethanol Blends and Section 3.2.4. Documentation for Dispenser Labeling Purposes. This proposal will align the regulations with the U.S. EPA’s rule that grants a 1-psi vapor pressure waiver to E–15 for summertime.

Item Block (B6)—The L&R Committee will consider a language modification to NIST HB 130, MOS Regulation, Section 2.36.2. and FLR Regulation Section 3.14.1. Labeling and Identification of Transmission Fluid. This proposal would add language that provides a cautionary statement on the labels of packaged obsolete transmission fluids.

FLR–21.1. Section 4.4. Product Storage and Dispenser Identification—The L&R Committee will consider a proposal to add language for identification of dispenser supply piping or meters to be marked and labeled in accordance with API Recommended Practice 1637 Using the API Color-Symbol System to Identify Equipment, Vehicles, and Transfer Points for Petroleum Fuels and Related

Products at Dispensing and Storage Facilities and Distribution Terminals.

**Kevin Kimball,**  
*Chief of Staff.*

[FR Doc. 2020–26480 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–13–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; Southeast Region Individual Fishing Quota (IFQ) Programs

**AGENCY:** National Marine Fisheries Service (NMFS), 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 by February 1, 2021.

**ADDRESSES:** Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at [adrienne.thomas@noaa.gov](mailto:adrienne.thomas@noaa.gov). Please reference OMB Control Number 0648–0551 in the subject line of your comments. All comments received are part of the public record and will generally be posted on [www.regulations.gov](http://www.regulations.gov) without change. 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 Adam Bailey, National Marine Fisheries Service, Southeast Regional Office, Sustainable Fisheries Division, 263 13th Ave. South, St. Petersburg, FL 33701, telephone: 727–824–5305, email: [adam.bailey@noaa.gov](mailto:adam.bailey@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The NMFS Southeast Regional Office manages three commercial individual fishing quota (IFQ) and individual transferable quota (ITQ) programs in the Southeast Region under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* The IFQ programs for red snapper, and groupers and tilefishes occur in Federal waters of the Gulf of Mexico (Gulf), and the ITQ program for wreckfish occurs in Federal waters of the South Atlantic.

The NMFS Southeast Regional Office proposes to extend and revise parts of the information collection currently approved under OMB Control Number 0648–0551. This collection of information tracks the transfer and use of IFQ and ITQ shares, and IFQ allocation and landings by commercial fishermen necessary for NMFS to operate, administer, and review management of the IFQ and ITQ programs. Regulations for the IFQ and ITQ programs are located at 50 CFR part 622.

For the Gulf IFQ programs, the revisions would collect additional business and demographic information on the IFQ Online Account Application, as well as add a requirement to input the vessel signature personal identification number (PIN) a second time on the Dealer Landing Transaction Report if a criterion is met. NMFS would make revisions to the IFQ Online Account Application to obtain ownership percentage data for any business that participates in the Gulf IFQ programs, as well as the type of business, and confirmation of whether the business is small or large, as defined by Small Business Administration standards. NMFS would revise the Dealer Landing Transaction Report to add a requirement for a shareholder to input the vessel signature PIN a second time if the landing transaction would result in a 10 percent overage of their catch allocation during that fishing year. NMFS proposes to add a feature to the Dealer Landing Transaction Report that would notify the shareholder that a 10 percent overage would occur and in which categories, and require the vessel signature PIN to accept the overage. Although the 10 percent overage is utilized infrequently, this would provide the shareholder the opportunity to transfer allocation and avoid using the 10 percent overage.

The purpose of revising the IFQ Online Account Application is to better comply with National Standard 4 (NS4) of the Magnuson-Stevens Act, the

Regulatory Flexibility Act (RFA), and the Small Business Administration's regulations implementing the RFA, Executive Order 12898, and the "fairness and equitable distribution" provisions of the Magnuson-Stevens Act, including NS4 and section 303(b)(6). The purpose of revising the Dealer Landing Transaction Report is to better inform participants in the Gulf IFQ programs and require an additional verification from them when the existing flexibility measure of a 10 percent overage of their allocation would occur.

If implemented by NMFS, these administrative revisions would slightly increase the estimated time per response to complete the IFQ Online Account Application. NMFS estimates the time per response would increase from 10 to 13 minutes. However, the estimated time per response for the Dealer Landing Transaction Report is not expected to change. The cost of both the IFQ Online Account Application and the Dealer Landing Transaction Report would remain the same. NMFS proposes no other revisions to the existing information collections for the IFQ and ITQ programs approved in OMB Control No. 0648–0551.

## II. Method of Collection

Information for the Gulf red snapper, and grouper and tilefish IFQ programs is collected electronically via a web-based system, through satellite-linked vessel monitoring systems, through a 24-hour call line, and with paper form submission for landing corrections, closing an account, and account applications, as well as landing transactions under catastrophic circumstances. The proposed revision would not change the methods currently used to collect information.

The share transfer process in the wreckfish ITQ program requires the signatures of witnesses on paper forms. The wreckfish ITQ program remains paper-based until the South Atlantic Fishery Management Council and NMFS consider whether to implement an electronic system. NMFS is not proposing to change the wreckfish ITQ program or information collection.

## III. Data

*OMB Control Number:* 0648–0551.

*Form Number(s):* None.

*Type of Review:* Regular submission [revision of a current information collection].

*Affected Public:* Businesses or other for-profit organizations.

*Estimated Number of Respondents:* 1,064.

*Estimated Time per Response:*

- Transfer Shares, 3 minutes
- Share Receipt, 2 minutes
- Account Update, 2 minutes
- Trip Ticket Update, 2 minutes
- Transfer Allocation, 3 minutes
- Landing Transaction Correction Request, 5 minutes
- Dealer Cost Recovery Fee Submission through *pay.gov*, 3 minutes
- Commercial Reef Fish Landing Location Request, 5 minutes
- Dealer Landing Transaction Report, 6 minutes (electronic form)
- Dealer Landing Transaction Report, 5 minutes (paper form used in catastrophic conditions only)
- IFQ Notification of Landing, 5 minutes
- Gulf Reef Fish Notification of Landing, 3 minutes
- IFQ Close Account, 3 minutes
- IFQ Online Account Application, 13 minutes
- Wreckfish Quota Share Transfer, 20 minutes

*Estimated Total Annual Burden Hours:* 2,397.

*Estimated Total Annual Cost to Public:* \$651 in recordkeeping and reporting costs.

*Respondent's Obligation:* Mandatory, required to obtain or retain benefits.

*Legal Authority:* Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*

## IV. Request for Comments

We are 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 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. 2020–26491 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Interagency Marine Debris Coordinating Committee Meeting

**AGENCY:** National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

**ACTION:** Notice of open meeting.

**SUMMARY:** Notice is hereby given of a virtual public meeting of the Interagency Marine Debris Coordinating Committee (IMDCC). IMDCC members will discuss federal marine debris activities, with a particular emphasis on the topics identified in the section on Matters to Be Considered.

**DATES:** The virtual public meeting will be held on December 15, 2020 from 10 a.m. to 11 a.m. EST.

**ADDRESSES:** The meeting will be held virtually. Refer to the Interagency Marine Debris Coordinating Committee website at <https://marinedebris.noaa.gov/IMDCC> for dial-in information and the most up-to-date agenda.

#### FOR FURTHER INFORMATION CONTACT:

Ya'el Seid-Green, Executive Secretariat, Interagency Marine Debris Coordinating Committee, Marine Debris Program, 1305 East-West Highway, Silver Spring, MD 20910; Phone 240–533–0399; Email [yael.seid-green@noaa.gov](mailto:yael.seid-green@noaa.gov) or visit the Interagency Marine Debris Coordinating Committee website at <https://marinedebris.noaa.gov/IMDCC>. To register for the meeting, contact Ya'el Seid-Green, [yael.seid-green@noaa.gov](mailto:yael.seid-green@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The Interagency Marine Debris Coordinating Committee (IMDCC) is a multi-agency body responsible for coordinating a comprehensive program of marine debris research and activities among federal agencies, in cooperation and coordination with non-governmental organizations, industry, academia, states, tribes, and other nations, as appropriate. Representatives meet to share information, assess and promote best management practices, and coordinate the Federal Government's efforts to address marine debris.



The Marine Debris Act establishes the IMDCC (33 U.S.C. 1954). The IMDCC submits biennial progress reports to Congress with updates on activities, achievements, strategies, and recommendations. The National Oceanic and Atmospheric Administration serves as the Chairperson of the IMDCC.

The meeting will be open to public attendance on December 15, 2020 from 10:00 a.m. to 11 a.m. EST (check agenda on website to confirm time). There will not be a public comment period.

**Matters To Be Considered:** The open meeting will include presentations on the marine debris monitoring and detection activities of the participating agencies. The agenda topics described are subject to change. The latest version of the agenda will be posted at <https://marinedebris.noaa.gov/IMDCC>.

**Special Accommodations:** The meeting is accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ya'el Seid-Green, Executive Secretariat at [yael.seid-green@noaa.gov](mailto:yael.seid-green@noaa.gov) or 240-533-0399 by December 9, 2020.

**Scott Lundgren,**

*Director, Office of Response and Restoration, National Ocean Service.*

[FR Doc. 2020-26508 Filed 11-30-20; 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; Alaska Region Logbook and Activity 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 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 February 1, 2021.

**ADDRESSES:** Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at [Adrienne.thomas@noaa.gov](mailto:Adrienne.thomas@noaa.gov). Please reference OMB Control Number 0648-0213 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 Gabrielle Aberle, (907-586-7228).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting renewal of this currently approved information collection that consists of paper logbooks and reports used for management of the groundfish fisheries in the Bering Sea and Aleutian Islands Management Area (BSAI) and the Gulf of Alaska (GOA); for management of the Individual Fishing Quota halibut and sablefish fisheries; and for management of the BSAI Crab Rationalization Program crab fisheries.

NMFS, Alaska Region, manages the groundfish and crab fisheries in the exclusive economic zone (EEZ) of the BSAI and the groundfish fisheries of the GOA under fishery management plans (FMPs) for the respective areas. The North Pacific Fishery Management Council prepared, and NMFS approved, the FMPs under the authority of the *Magnuson-Stevens Fishery Conservation and Management Act*, 16 U.S.C. 1801 *et seq.* Regulations implementing the FMPs appear at 50 CFR parts 679 and 680. Regulations for the logbooks and reports in this information collection are at 50 CFR 679.5.

The information collected through the paper logbooks and reports promotes the goals and objectives of the fishery management plans, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws. The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources.

Collecting information from fishery participants is necessary to promote successful management of groundfish, crab, Pacific halibut, and salmon resources. A comprehensive information system that identifies the participants and monitors their fishing activity is necessary to enforce the management

measures and prevent overfishing. An information system is also needed to measure the consequences of management controls. This collection supports an effective monitoring and enforcement system with information that includes identification of the participating vessels, operators, dealers, and processors; location of the fishing activity; timeframes when fishing and processing is occurring; and shipment and transfer of fishing products.

All vessels of the United States harvesting EEZ fish and shoreside processors, stationary floating processors (SFPs), and motherships receiving EEZ-caught fish are required to hold a Federal permit and thus comply with reporting requirements per CFR 679.5. The data collected are used for making in-season and inter-season management decisions that affect the groundfish resources and the fishing industry that uses them.

This information collection contains four components: Paper logbooks, vessel activity reports, check-in/check-out reports, and product transfer reports.

- Daily logbooks provide data about the location and timing of fishing effort, as well as discard information of prohibited species. NOAA Office for Law Enforcement (OLE) and the United States Coast Guard (USCG) use logbook information during vessel boardings and site visits to ensure conservation of groundfish, compliance with regulations, and reporting accuracy by the fishing industry. The logbooks are also an important source of information for NMFS to determine where and when fishing activity occurs and the number of sets and hauls.

- A vessel activity report provides information about fish or fish product on board a vessel when it crosses the boundary of the EEZ off Alaska or crosses the U.S.—Canada international boundary between Alaska and British Columbia. NOAA OLE and USCG boarding officers use this information to audit and separate product inventory when boarding a vessel. Without the requirement to submit this prior to crossing, vessel operators may be more inclined to illegally fish in Federal waters and claim retained product was harvested from foreign or international waters.

- Check-in/check-out reports provide information on participation by processors and motherships in the groundfish fisheries. The check-in/check-out information is used by NMFS in-season managers to monitor the fishing capacity and effort in fishery allocations and quotas. Additionally, NOAA OLE agents use this information to track commercial business activity



and ensure accurate accountability and proper reporting is being performed.

- Product transfer reports (PTRs) provide information on the volume of groundfish disposed of by persons buying it from the harvesters. The PTR is an important enforcement document and provides an important check on buyer purchase reports. Information collected on PTRs is used by NOAA OLE to verify the accuracy of reported shipments through physical inspections. NOAA OLE uses the PTR to monitor movement of product in and out of the processor on a timely basis.

## II. Method of Collection

Paper logbooks are submitted by mail or delivery. The Vessel Activity Report and Product Transfer Report are submitted by fax or email. Check-in/Check-out Reports are submitted by fax.

## III. Data

*OMB Control Number:* 0648–0213.

*Form Number(s):* None.

*Type of Review:* Regular submission (extension of a current information collection).

*Affected Public:* Individuals or households; Business or other for-profit organizations.

*Estimated Number of Respondents:* 445.

*Estimated Time per Response:* Catcher Vessel Trawl Daily Fishing Logbook (DFL): 18 minutes; Catcher Vessel Longline/Pot DFL: 35 minutes; Catcher/Processor Longline/Pot Daily Cumulative Production Logbook: 50 minutes; Shoreside Processor Check-in/Check-out Report: 5 minutes; Mothership Check-in/Check-out Report: 7 minutes; Product Transfer Report: 20 minutes; Vessel Activity Report: 14 minutes.

*Estimated Total Annual Burden Hours:* 15,654 hours.

*Estimated Total Annual Cost to Public:* \$9,954.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

## 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. 2020–26492 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XA673]

### Index Based Methods and Harvest Control Rules Research Track Assessment Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** NMFS and the Center for Independent Experts (CIE) Panel will convene the Research Track Assessment Peer Review Meeting for the purpose of reviewing Index Based Methods and Harvest Control Rules. The Research Track Assessment Peer Review is a formal scientific peer-review process for evaluating and presenting stock assessment results to managers for fish stocks in the offshore U.S. waters of the northwest Atlantic. Assessments are prepared by Stock Assessment Workshop (SAW) working groups and reviewed by an independent panel of stock assessment experts from the Center of Independent Experts (CIE). The public is invited to attend the presentations and discussions between the review panel and the scientists who have participated in the stock assessment process.

**DATES:** The public portion of the Research Track Assessment Peer Review Meeting will be held from December 7, 2020–December 11, 2020. The meeting will commence on December 11, 2020 at 3 p.m. Eastern Standard Time. Please see **SUPPLEMENTARY INFORMATION** for the daily meeting agenda.

**ADDRESSES:** The meeting will be held via Google Meet (<https://meet.google.com/urc-hmkh-jdw>).

**FOR FURTHER INFORMATION, CONTACT:** Michele Traver, 508–495–2195; email: [michele.traver@noaa.gov](mailto:michele.traver@noaa.gov).

**SUPPLEMENTARY INFORMATION:** For further information, please visit the NEFSC website at <https://www.fisheries.noaa.gov/region/new-england-mid-atlantic>. For additional information about the assessment process and the stock assessment peer review, please visit the NMFS/NEFSC SAW web page at <https://www.fisheries.noaa.gov/new-england-mid-atlantic/population-assessments/fishery-stock-assessments-new-england-and-mid-atlantic>.

**Daily Meeting Agenda—Research Track Peer Review Meeting (Subject to Change; All Times are Approximate and May Be Changed at the Discretion of the Peer Review Chair)**

*Monday, December 7, 2020*

| Time                  | Activity                             | Lead                        |
|-----------------------|--------------------------------------|-----------------------------|
| 8 a.m.–8:30 a.m.      | Welcome/Logistics                    | Russ Brown/                 |
| 8:30 a.m.–9 a.m.      | Introductions/Process                | Michele Traver/Panel Chair. |
| 9 a.m.–10 a.m.        | Material Introduction and Background | Chris Legault, WG Chair.    |
| 10 a.m.–10:15 a.m.    | TOR #1                               | Chris Legault, WG Chair.    |
| 10:15 a.m.–11:15 a.m. | Break.                               |                             |
| 11:15 a.m.–11:45 a.m. | TOR #1 cont                          | Chris Legault, WG Chair.    |
| 11:45 a.m.–12 p.m.    | Discussion/Review/Summary            | Review Panel.               |
| 12 p.m.–1 p.m.        | Public Comment                       | Public.                     |
|                       | Lunch.                               |                             |

| Time                     | Activity                        | Lead                     |
|--------------------------|---------------------------------|--------------------------|
| 1 p.m.–2:15 p.m .....    | TOR #2 .....                    | Chris Legault, WG Chair. |
| 2:15 p.m.–2:45 p.m ..... | Discussion/Review/Summary ..... | Review Panel.            |
| 2:45 p.m.–3 p.m .....    | Public Comment .....            | Public.                  |
| 3 p.m .....              | Adjourn.                        |                          |

*Tuesday, December 8, 2020*

| Time                       | Activity                           | Lead                        |
|----------------------------|------------------------------------|-----------------------------|
| 8 a.m.–8:15 a.m .....      | Brief Overview and Logistics ..... | Michele Traver/Panel Chair. |
| 8:15 a.m.–9:15 a.m .....   | TOR #2 cont .....                  | Chris Legault, WG Chair.    |
| 9:15 a.m.–10:15 a.m .....  | TOR #3 .....                       | Chris Legault, WG Chair.    |
| 10:15 a.m.–10:30 a.m ..... | Break.                             |                             |
| 10:30 a.m.–11:30 a.m ..... | TOR #3 cont .....                  | Chris Legault, WG Chair.    |
| 11:30 a.m.–12 p.m .....    | Discussion/Review/Summary .....    | Review Panel.               |
| 12 p.m.–12:15 p.m .....    | Public Comment .....               | Public.                     |
| 12:15 p.m.–1:15 p.m .....  | Lunch.                             |                             |
| 1:15 p.m.–2:15 p.m .....   | TOR #4 .....                       | Chris Legault, WG Chair.    |
| 2:15 p.m.–2:45 p.m .....   | Discussion/Review/Summary .....    | Review Panel.               |
| 2:45 p.m.–3 p.m .....      | Public Comment .....               | Public.                     |
| 3 p.m .....                | Adjourn.                           |                             |

*Wednesday, December 9, 2020*

| Time                       | Activity                           | Lead                            |
|----------------------------|------------------------------------|---------------------------------|
| 8 a.m.–8:15 a.m .....      | Brief Overview and Logistics ..... | Michele Traver/<br>Panel Chair. |
| 8:15 a.m.–9:15 a.m .....   | TOR #4 cont .....                  | Chris Legault, WG Chair.        |
| 9:15 a.m.–10:15 a.m .....  | TOR #5 .....                       | Chris Legault, WG Chair.        |
| 10:15 a.m.–10:30 a.m ..... | Break.                             |                                 |
| 10:30 a.m.–11:30 a.m ..... | TOR #5 cont .....                  | Chris Legault, WG Chair.        |
| 11:30 a.m.–12 p.m .....    | Discussion/Review/Summary .....    | Review Panel.                   |
| 12 p.m.–12:15 p.m .....    | Public Comment .....               | Public.                         |
| 12:15 p.m.–1:15 p.m .....  | Lunch.                             |                                 |
| 1:15 p.m.–2:15 p.m .....   | TOR #6 cont .....                  | Chris Legault, WG Chair.        |
| 2:15 p.m.–2:45 p.m .....   | Discussion/Review/Summary .....    | Review Panel.                   |
| 2:45 p.m.–3 p.m .....      | Public Comment .....               | Public.                         |
| 3 p.m .....                | Adjourn.                           |                                 |

*Thursday, December 10, 2020*

| Time                       | Activity                           | Lead                        |
|----------------------------|------------------------------------|-----------------------------|
| 8 a.m.–8:15 a.m .....      | Brief Overview and logistics ..... | Michele Traver/Panel Chair. |
| 8:15 a.m.–9:15 a.m .....   | TOR #6 cont .....                  | Chris Legault, WG Chair.    |
| 9:15 a.m.–10:15 a.m .....  | Discussion/Review/Summary .....    | Review Panel.               |
| 10:15 a.m.–10:30 a.m ..... | Break.                             |                             |
| 10:30 a.m.–11:30 a.m ..... | Discussion/Follow-ups .....        | Review Panel.               |
| 11:30 a.m.–11:45 a.m ..... | Public Comment .....               | Public.                     |
| 11:45 a.m.–12:45 p.m ..... | Lunch.                             |                             |
| 12:45 p.m.–3 p.m .....     | Report Writing .....               | Review Panel.               |
| 5 p.m .....                | Adjourn.                           |                             |

*Friday, December 11, 2020*

| Time               | Activity             | Lead          |
|--------------------|----------------------|---------------|
| 8 a.m.–3 p.m ..... | Report Writing ..... | Review Panel. |
| 3 p.m .....        | Adjourn.             |               |

The meeting is open to the public; however, during the 'Report Writing' session on Thursday, December 10th

and Friday, December 11th, the public should not engage in discussion with the Peer Review Panel.

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Special

requests should be directed to Michele Traver, 508–495–2195, at least 5 days prior to the meeting date.

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

Dated: November 20, 2020.

**Jennifer M. Wallace,**

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

[FR Doc. 2020–26137 Filed 11–30–20; 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; Northeast Region Observer Providers Requirements

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 July 7, 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:** Northeast Region Observer Providers Requirements.

**OMB Control Number:** 0648–0546.

**Form Number(s):** None.

**Type of Request:** Regular submission (extension of a current information collection).

**Number of Respondents:** 515.

**Average Hours per Response:**

Application for approval of observer service provider, 10 hours; applicant response to denial of application for approval of observer service provider, 10 hours; observer service provider request for observer training, 30 minutes; observer deployment report, 10 minutes; observer availability report, 10 minutes; safety refusal report, 30 minutes; submission of raw observer data, 5 minutes; observer debriefing, 2 hours; other reports, 30 minutes; biological samples, 5 minutes; rebuttal of pending removal from list of approved observer service providers, 8

hours; vessel request to observer service provider for procurement of a certified observer, 10 minutes; observer contact list updates, 5 minutes; observer availability updates, 5 minutes; service provider material submissions, 30 minutes; service provider contracts, 30 minutes; request to observer service provider to procure and observer, 10 minutes; notification of unavailability of observers, 5 minutes.

**Total Annual Burden Hours:** 5,252.

**Needs and Uses:** This request is for extension of a currently approved information collection. Under the Magnuson-Stevens Fishery Conservation and Management Act, the Secretary of Commerce (Secretary) has the responsibility for the conservation and management of marine fishery resources. Much of this responsibility has been delegated to the National Oceanic and Atmospheric Administration (NOAA)/National Marine Fisheries Service (NMFS). Under this stewardship role, the Secretary was given certain regulatory authorities to ensure the most beneficial uses of these resources. One of the regulatory steps taken to carry out the conservation and management objectives is to collect data from users of the resource.

Regulations at 50 CFR 648.11(g) require observer service providers to comply with specific requirements in order to operate as an approved provider in the Atlantic sea scallop (scallop) fishery. Observer service providers must comply with the following requirements: Submit applications for approval as an observer service provider; formally request observer training by the Northeast Fisheries Observer Program (NEFOP); submit observer deployment reports and biological samples; give notification of whether a vessel must carry an observer within 24 hours of the vessel owner's notification of a prospective trip; maintain an updated contact list of all observers that includes the observer identification number; observer's name mailing address, email address, phone numbers, homeports or fisheries/trip types assigned, and whether or not the observer is "in service." The regulations also require observer service providers submit any outreach materials, such as informational pamphlets, payment notification, and descriptions of observer duties as well as all contracts between the service provider and entities requiring observer services for review to NMFS/NEFOP. Observer service providers also have the option to respond to application denials, and submit a rebuttal in response to a pending removal from the list of

approved observer providers. These requirements allow NMFS/NEFOP to effectively administer the scallop observer program.

**Affected Public:** Business or other for-profit organizations.

**Frequency:** On occasion.

**Respondent's Obligation:** Mandatory.

**Legal Authority:** 50 CFR 648.11.

This information collection request may be viewed at [www.reginfo.gov](http://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](http://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 0648–0546.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2020–26463 Filed 11–30–20; 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; NOAA Fisheries Greater Atlantic Region Vessel Identification Requirements

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 July 23, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

**Agency:** NOAA.

*Title:* NOAA Fisheries Greater Atlantic Region Vessel Identification Requirements.

*OMB Control Number:* 0648–0350.

*Form Number(s):* None.

*Type of Request:* Regular submission (extension of a current information collection).

*Number of Respondents:* 3,893.

*Average Hours per Response:* 45 minutes.

*Total Annual Burden Hours:* 2,920.

*Needs and Uses:* This request is for extension of a current information collection.

Regulations at 50 CFR 648.8 and § 697.8 require that owners of vessels over 25 ft (7.6 m) in registered length that have Federal permits to fish in the Greater Atlantic Region display the vessel's name and official number. The name and number must be of a specific size at specified locations: the vessel name must be affixed to the port and starboard sides of the bow and, if possible, on its stern. The official number must be displayed on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck so as to be clearly visible from enforcement vessels and aircraft. The display of the identifying characters aids in fishery law enforcement.

*Affected Public:* Individuals or households and business or other for-profit organizations.

*Frequency:* Once per year.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* 50 CFR 648.8.

This information collection request may be viewed at [www.reginfo.gov](http://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](http://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 0648–0350.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2020–26462 Filed 11–30–20; 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; For-Hire Telephone Survey

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 June 24, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* National Oceanic & Atmospheric Administration (NOAA), Commerce.

*Title:* For-Hire Telephone Survey.

*OMB Control Number:* 0648–0709.

*Form Number(s):* None.

*Type of Request:* Regular submission (extension of a current information collection).

*Number of Respondents:* 23,114.

*Average Hours per Response:* 3 minutes, 30 seconds.

*Total Annual Burden Hours:* 1,348.

*Needs and Uses:* This request is for extension of a currently approved information collection. The For-Hire Survey (FHS) is conducted for NMFS to estimate fishing effort on for-hire vessels (i.e., charter boats and head boats) in coastal states from Maine to Mississippi. These data are required to carry out provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), as amended, regarding conservation and management of fishery resources.

The FHS collects fishing effort information from for-hire vessel representatives by telephone interview. For-hire vessels are randomly selected for the FHS from a comprehensive sample frame developed and maintained by NMFS. A sample of 10% of the vessels on the FHS frame are selected for reporting each week. Each interview collects information about the vessel, the number and type of trips the vessel made during the reporting week, the number of anglers on each trip, and other trip-level information.

For-hire fishing effort is estimated in numbers of angler-trips per sub-region, state, two-month wave, vessel type, and fishing area (inshore, nearshore, offshore). To get a total for-hire effort estimate, weekly FHS effort estimates are summed to produce wave estimates that are adjusted to account for frame coverage and reporting error. The FHS estimates are then combined with for-hire catch-rate estimates derived from complementary Marine Recreational Information Program (MRIP) surveys, to estimate total, state-level fishing catch. These estimates are used in the development, implementation, and monitoring of fishery management programs by the NMFS, regional fishery management councils, interstate marine fisheries commissions, and state fishery agencies.

*Affected Public:* Individuals or households; Business or other for-profit organizations.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Magnuson-Stevens Fishery Conservation and Management Act.

This information collection request may be viewed at [www.reginfo.gov](http://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](http://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 0648–0709.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2020–26461 Filed 11–30–20; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XA581]

#### Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Cost Recovery Programs

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

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of standard prices and fee percentages.

**SUMMARY:** NMFS publishes standard prices and fee percentages for cost recovery for the Amendment 80 Program, the American Fisheries Act (AFA) Program, the Aleutian Islands Pollock (AIP) Program, and the Western Alaska Community Development Quota (CDQ) groundfish and halibut Programs. The fee percentage for 2020 is 1.19 percent for the Amendment 80 Program, 0.21 percent for the AFA inshore cooperatives, 3.0 percent for the AIP program, and 0.84 percent for the CDQ groundfish and halibut Programs. This action is intended to provide the 2020 standard prices and fee percentages to calculate the required payment for cost recovery fees due by December 31, 2020.

**DATES:** The standard prices and fee percentages are valid on December 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Charmaine Weeks, Fee Coordinator, 907-586-7231.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 304(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens

Act) authorizes and requires the collection of cost recovery fees for limited access privilege programs and the CDQ Program. Cost recovery fees recover the actual costs directly related to the management, data collection, and enforcement of the programs. Section 304(d) of the Magnuson-Stevens Act mandates that cost recovery fees not exceed 3 percent of the annual ex-vessel value of fish harvested by a program subject to a cost recovery fee, and that the fee be collected either at the time of landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

NMFS manages the Amendment 80 Program, AFA Program, and AIP Program as limited access privilege programs. On January 5, 2016, NMFS published a final rule to implement cost recovery for these three limited access privilege programs and the CDQ groundfish and halibut programs (81 FR 150). The designated representative (for the purposes of cost recovery) for each program is responsible for submitting the fee payment to NMFS on or before the due date of December 31 of the year in which the landings were made. The total dollar amount of the fee due is determined by multiplying the NMFS published fee percentage by the ex-vessel value of all landings under the

program made during the fishing year. NMFS publishes this notice of the fee percentages for the Amendment 80, AFA, AIP, and CDQ groundfish and halibut fisheries in the **Federal Register** by December 1 each year.

**Standard Prices**

The fee liability is based on the ex-vessel value of fish harvested in each program. For purposes of calculating cost recovery fees, NMFS calculates a standard ex-vessel price (standard price) for each species. A standard price is determined using information on landings purchased (volume) and ex-vessel value paid (value). For most groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery to estimate a standard price for each species. The standard prices are described in U.S. dollars per pound for landings made during the year. The standard prices for all species in the Amendment 80, AFA, AIP, and CDQ groundfish and halibut programs are listed in Table 1. Each landing made under each program is multiplied by the appropriate standard price to arrive at an ex-vessel value for each landing. These values are summed together to arrive at the ex-vessel value of each program (fishery value).

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2020 FISHING YEAR

| Species             | Gear type  | Reporting period                   | Standard ex-vessel price per pound (\$) |
|---------------------|------------|------------------------------------|-----------------------------------------|
| Arrowtooth flounder | All        | January 1, 2020–October 31, 2020   | \$0.16                                  |
| Atka mackerel       | All        | January 1, 2020–October 31, 2020   | 0.23                                    |
| Flathead sole       | All        | January 1, 2020–October 31, 2020   | 0.15                                    |
| Greenland turbot    | All        | January 1, 2020–October 31, 2020   | 0.53                                    |
| CDQ halibut         | Fixed gear | October 1, 2019–September 30, 2020 | 3.82                                    |
| Pacific cod         | Fixed gear | January 1, 2020–October 31, 2020   | 0.42                                    |
|                     | Trawl gear | January 1, 2020–October 31, 2020   | 0.37                                    |
| Pacific ocean perch | All        | January 1, 2020–October 31, 2020   | 0.15                                    |
| Pollock             | All        | January 1, 2019–December 31, 2019  | 0.14                                    |
| Rock sole           | All        | January 1, 2020–March 31, 2020     | 0.24                                    |
|                     | All        | April 1, 2020–October 31, 2020     | 0.13                                    |
| Sablefish           | Fixed gear | October 1, 2019–September 30, 2020 | 2.12                                    |
|                     | Trawl gear | January 1, 2020–October 31, 2020   | 0.61                                    |
| Yellowfin sole      | All        | January 1, 2020–October 31, 2020   | 0.15                                    |

**Fee Percentage**

NMFS calculates the fee percentage each year according to the factors and methods described at 50 CFR 679.33(c)(2), 679.66(c)(2), 679.67(c)(2), and 679.95(c)(2). NMFS determines the fee percentage that applies to landings made during the year by dividing the total costs directly related to the management, data collection, and

enforcement of each program (direct program costs) during the year by the fishery value. NMFS captures direct program costs through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. For 2020, the direct program costs were tracked from October 1, 2019, to September 30, 2020 (the end of the fiscal year). The

individual 2020 fee percentages for the Amendment 80 Program and the Western Alaska CDQ groundfish and halibut Programs are higher relative to percentages calculated for the programs in 2019. The 2020 percentage for the AFA Program was less than the 2019 percentage, and the 2020 percentage for the Aleutian Islands Pollock Program remained the same as 2019.

NMFS will provide an annual report that summarizes direct program costs for each of the programs in early 2021. NMFS calculates the fishery value as described under the section Standard Prices.

#### *Amendment 80 Program Standard Prices and Fee Percentage*

The Amendment 80 Program allocates total allowable catches (TACs) of groundfish species, other than Bering Sea pollock, to identified trawl catcher/processors in the Bering Sea and Aleutian Islands (BSAI). The Amendment 80 Program allocates a portion of the BSAI TACs of six species: Atka mackerel, Pacific cod, flathead sole, rock sole, yellowfin sole, and Aleutian Islands Pacific ocean perch. Participants in the Amendment 80 sector have established cooperatives to harvest these allocations. Each Amendment 80 cooperative is responsible for payment of the cost recovery fee for fish landed under the Amendment 80 Program. Cost recovery requirements for the Amendment 80 Program are at 50 CFR 679.95.

For most Amendment 80 species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. Regulations specify that for rock sole, NMFS shall calculate a separate standard price for two periods—January 1 through March 31, and April 1 through October 31, which accounts for a substantial difference in estimated rock sole prices during the first quarter of the year relative to the remainder of the year. The volume and value information is obtained from the First Wholesale Volume and Value Report, and the Pacific Cod Ex-Vessel Volume and Value Report.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2020 calendar year is 1.19 percent for the Amendment 80 Program. For 2020, NMFS applied the fee percentage to each Amendment 80 species landing that was debited from an Amendment 80 cooperative quota allocation between January 1 and December 31 to calculate the Amendment 80 fee liability for each Amendment 80 cooperative. The 2020 fee payments must be submitted to NMFS on or before December 31, 2020. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.95(a)(3)(iv).

#### *AFA Standard Price and Fee Percentages*

The AFA allocates the Bering Sea directed pollock fishery TAC to three sectors—catcher/processor, mothership, and inshore. Each sector has established cooperatives to harvest the sector's exclusive allocation. In 2020, the cooperative for the inshore sector is responsible for paying the fee for Bering Sea pollock landed under the AFA. Cost recovery requirements for the AFA sectors are at 50 CFR 679.66.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish & Game for the Commercial Operator's Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Bering Sea pollock. Due to the time required to compile the data, there is a one-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2019 gross earnings data to calculate the standard price for 2020 pollock landings.

Under the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2020 calendar year is 0.21 percent for the AFA inshore sector. To calculate the 2020 fee liabilities, NMFS applied the respective fee percentages to the landings of Bering Sea pollock debited from each cooperative's fishery allocation that occurred between January 1 and December 31. The 2020 fee payments must be submitted to NMFS on or before December 31, 2020. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.66(a)(4)(iv).

#### *AIP Program Standard Price and Fee Percentage*

The AIP Program allocates the Aleutian Islands directed pollock fishery TAC to the Aleut Corporation, consistent with the Consolidated Appropriations Act of 2004 (Pub. L. 108–109), and its implementing regulations. Annually, prior to the start of the pollock season, the Aleut Corporation provides NMFS with the identity of its designated representative for harvesting the Aleutian Islands directed pollock fishery TAC. The same individual is responsible for the submission of all cost recovery fees for pollock landed under the AIP Program. Cost recovery requirements for the AIP Program are at 50 CFR 679.67.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska

Department of Fish & Game for the Commercial Operator's Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Aleutian Islands pollock. Due to the time required to compile the data, there is a one-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2019 gross earnings data to calculate the standard price for 2020 pollock landings.

For the 2020 fishing year, the Aleut Corporation selected participants to harvest or process the Aleutian Islands directed pollock fishery TAC. Some harvest occurred; however, the majority of that TAC was eventually reallocated to the Bering Sea directed pollock fishery TAC. Due to the small harvest, the estimated percentage of direct program costs to fishery value for the 2020 calendar year were disproportionately high and well above 3 percent. Pursuant to section 304(d)(2)(B) of the Magnuson-Stevens Act, the fee percentage amount must not exceed 3 percent. Therefore, the 2020 fee percentage is set at 3 percent. To calculate the 2020 fee liability, NMFS applied the respective fee percentage to the pollock landings attributed to the AIP Program that occurred between January 1 and December 31. The 2020 fee payments must be submitted to NMFS on or before December 31, 2020. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.67(a)(3)(iv).

#### *CDQ Standard Price and Fee Percentage*

The CDQ Program was implemented in 1992 to provide access to BSAI fishery resources to villages located in Western Alaska. Section 305(i) of the Magnuson-Stevens Act identifies 65 villages eligible to participate in the CDQ Program and the six CDQ groups to represent these villages. CDQ groups receive exclusive harvesting privileges of the TACs for a broad range of crab species, groundfish species, and halibut. NMFS implemented a CDQ cost recovery program for the BSAI crab fisheries in 2005 (70 FR 10174, March 2, 2005) and published the cost recovery fee percentage for the 2020/2021 crab fishing year on July 10, 2020 (85 FR 41566). This notice provides the cost recovery fee percentage for the CDQ groundfish and halibut programs. Each CDQ group is subject to cost recovery fee requirements for landed groundfish and halibut, and the designated representative of each CDQ group is responsible for submitting payment for their CDQ group. Cost recovery

requirements for the CDQ Program are at 50 CFR 679.33.

For most CDQ groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. The volume and value information is obtained from the First Wholesale Volume and Value Report and the Pacific Cod Ex-Vessel Volume and Value Report. For CDQ halibut and fixed-gear sablefish, NMFS calculates the standard prices using information from the Individual Fishing Quota (IFQ) Ex-Vessel Volume and Value Report, which collects information on both IFQ and CDQ volume and value.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2020 calendar year is 0.84 percent for the CDQ groundfish and halibut programs. For 2020, NMFS applied the calculated CDQ fee percentage to all CDQ groundfish and halibut landings made between January 1 and December 31 to calculate the CDQ fee liability for each CDQ group. The 2020 fee payments must be submitted to NMFS on or before December 31, 2020. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.33(a)(3)(iv).

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

Dated: November 24, 2020.

**Jennifer M. Wallace,**  
*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. 2020-26432 Filed 11-30-20; 8:45 am]

**BILLING CODE 3510-22-P**

## CONSUMER PRODUCT SAFETY COMMISSION

### CPSC Artificial Intelligence Forum

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Announcement of forum.

**SUMMARY:** Consumer Product Safety Commission (CPSC) staff is holding a forum on artificial intelligence (AI), and related technologies, such as Machine Learning (ML). CPSC staff invites interested parties to attend or participate in the AI forum via webinar.

**DATES:** The AI forum will take place from 9 a.m. to 4 p.m., Eastern Standard Time (EST) on Tuesday, March 2, 2021, via webinar. All attendees should pre-register for the webinar. Individuals interested in serving on panels or presenting information at the forum should register by January 15, 2021. All

other individuals who wish to attend the forum should register by February 15, 2021.

**ADDRESSES:** The forum will be held via webinar. Attendance is free of charge. Persons interested in attending the forum should register online at: <https://attendee.gotowebinar.com/register/4723099942466621456> and fill in the information. After registering, you will receive a confirmation email containing information about joining the webinar. Persons interested in serving on a panel or presenting information should email [ntaylor@cpsc.gov](mailto:ntaylor@cpsc.gov) an abstract by January 4, 2021. Detailed instructions for the webinar participants and other interested parties will be made available on the CPSC website on the public calendar: <https://cpsc.gov/newsroom/public-calendar>.

**FOR FURTHER INFORMATION CONTACT:** Nevin Taylor, Chief Technologist, 4330 East West Highway, Bethesda, MD 20814; telephone: 301-509-0264; email: [ntaylor@cpsc.gov](mailto:ntaylor@cpsc.gov).

**SUPPLEMENTARY INFORMATION:** CPSC staff is hosting an AI forum to collect information on the voluntary consensus standards, certification, and product specification efforts associated with products using AI, ML, and related technologies. The information collected from the forum will assist staff in making recommendations for improving the safety of consumer products that include this technology.

### I. Background

For this Forum, we are generally defining “Artificial intelligence” (AI) as any method for programming computers or products to enable them to carry out tasks or behaviors that would require intelligence if performed by humans.<sup>1</sup> “Machine learning” (ML) is typically understood to be an iterative process of applying models or algorithms to data sets to learn and detect patterns and/or perform tasks, such as prediction or decision making that can approximate some aspects of intelligence.<sup>2</sup>

#### A. Potential Uses of AI ML in Consumer Products To Improve Product Safety

CPSC staff is aware of consumer products with claims of AI inclusion. Children’s toys, residential appliances, and recreational products are being marketed touting the use of AI, ML, and related technologies to improve product efficacy and consumer experience.

<sup>1</sup> <https://www.nap.edu/catalog/25021/the-frontiers-of-machine-learning-2017-raymond-and-beverly-sackler>.

<sup>2</sup> Ian Goodfellow, Yoshua Bengio, Aaron Courville, *Deep Learning* (Adaptive Computation and Machine Learning series), (MIT Press, 2016), 1.

Although opportunities exist for manufacturers to improve safety using new technologies, hazards may also be associated with the inclusion of these technologies.

### B. AI, ML, and Related Technologies

AI, ML, and related technologies have the potential to dramatically change the nature of consumer products, with important ramifications for CPSC’s responsibilities to protect consumers from product hazards. In particular, products with AI or ML technologies would be learning from the consumer and from the operational environment for the product. Customization occurs through the evolution of products after delivery to the consumer, resulting in significant ramifications for manufacturer’s implementation of AI and ML that shape products and transform consumer experience. Although adapting to consumer preferences has the potential to make significant strides in product customization of features and safety enhancements, using data to predict and enhance product operation could result in safety hazards.

### C. Ramifications of AI and ML in Consumer Products

Manufacturers may not fully understand the operation of the AI-enabled products, particularly for those using genetic algorithms and other evolutionary AI techniques. Changes to the product after purchase may impede CPSC’s ability to replicate reported hazards, creating challenges for compliance investigations and product safety standards development.

### D. Relevant Voluntary Standards

Voluntary standards organizations are developing consensus standards related to AI and ML technologies that will likely inform and improve safety-related characteristics in consumer products. AI and ML standards in the automotive, aerospace, and defense industries are ongoing, and knowledge from these efforts may be valuable in consumer product safety standards development.

## II Forum Topics

The AI forum will discuss existing and proposed voluntary consensus standards, certifications, testing methods, product specifications, best practices, and similar guidance for AI, ML, and related technologies. There is currently considerable interest in exploring a variety of areas of AI and ML, including ethics, security, and privacy. However, given the CPSC mission, this forum is focused on obtaining information specific to

assisting the agency's safety efforts with consumer products that use these technologies. CPSC staff is interested in discussing the best way to provide guidance to manufacturers and importers of consumer products with AI and ML, to test products for safety that address the following considerations:

- **Identification:**
  - Determine presence of AI and ML in consumer products.
    - Does the product have AI and ML components?
- **Implications:**
  - Differentiate what AI and ML functionality exists.
    - What are the AI and ML capabilities?
- **Impact:**
  - Discern how AI and ML dependencies affect consumers.
    - Do AI and ML affect consumer product safety?
- **Iteration:**
  - Distinguish when AI and ML, evolve and how this transformation changes outcomes.
    - When do products evolve/transform, and do the evolutions/transformations affect product safety?

### III. Forum Details

#### A. Forum Time and Place

CPSC staff will hold the forum from 9 a.m. to 4 p.m., EST on Tuesday, March 2, 2021, via webinar.

#### B. Forum Registration

If you would like to attend the AI Forum, but you do not wish to make a presentation or participate on a panel, please register online by February 15, 2021. (See the **ADDRESSES** portion of this document for the website link and instructions to register.)

If you would like to make a presentation at the AI Forum, or you wish to be considered as a panel member for a specific topic or topics, email an electronic version of your abstract to Nevin Taylor, [ntaylor@cpsc.gov](mailto:ntaylor@cpsc.gov), by January 4, 2021. Abstracts should be relevant to the forum topic and no longer than two pages. Staff will select panelists and individuals to make presentations at the AI forum based on considerations such as: The submitted abstract information, the individual's demonstrated familiarity or expertise with the topic to be discussed, the practical utility of the information to be presented, and the individual's viewpoint or ability to represent certain interests (such as large manufacturers, small manufacturers, consumer advocates, and consumers). Staff would like the presentations to represent and address a wide variety of stakeholders

and interests. Staff will notify those who are selected to make a presentation or participate in a panel by January 15, 2021, so that you can prepare and provide your final presentation by February 12, 2021.

Although staff will make an effort to accommodate all persons who wish to make a presentation, the time allotted for presentations will depend on the agenda and the number of persons who wish to speak on a given topic. Staff recommends that individuals and organizations with common interests consolidate or coordinate their presentations, and request time for a joint presentation. If you have any questions regarding participating in the forum, contact Nevin Taylor, [ntaylor@cpsc.gov](mailto:ntaylor@cpsc.gov), 301-509-0264.

**Alberta E. Mills,**

*Secretary, U.S. Consumer Product Safety Commission.*

[FR Doc. 2020-26441 Filed 11-30-20; 8:45 am]

**BILLING CODE 6355-01-P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DoD-2020-OS-0069]

#### Submission for OMB Review; Comment Request

**AGENCY:** National Defense University, Department of Defense (DoD).

**ACTION:** 30-Day information collection notice.

**SUMMARY:** The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

**DATES:** Consideration will be given to all comments received by December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

**FOR FURTHER INFORMATION CONTACT:** Angela James, 571-372-7574, or [whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil](mailto:whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil).

#### SUPPLEMENTARY INFORMATION:

*Title; Associated Form; and OMB Number:* National Defense University (NDU) Student Profile; OMB Control Number 0704-XXXX.

*Type of Request:* Existing collection in use without an OMB Control Number.

*Number of Respondents:* 2,525.

*Responses per Respondent:* 1.

*Annual Responses:* 2525.

*Average Burden per Response:* 20 minutes.

*Annual Burden Hours:* 841.7 hours.

*Needs and Uses:* This information collection is required to complete the official student record, which is stored in the University Student Management System (USMS), a component of the NDU Enterprise Information System. Through this information collection, students provide profile information such as demographics, educational background, military service or professional background, and emergency contact information. The information is critical to university operations as it is used to fulfill mandatory reporting requirements and ensure the safety of students. The information is collected from students electronically, via a web-based form that contains a combination of selected-response (radio buttons, drop-down menus) and open-response items. The National Defense University Student Profile (NSP) is completed by all students, and is administered using a Drupal-based survey platform provided by USA Learning. The data are downloaded, processed, and transferred to the USMS by NDU's Office of Institutional Research. The end result is a set of complete student records for each academic year in the official repository for such record. The data are used for various institutional purposes such as mandatory reporting and notifying students of emergencies or closures.

*Affected Public:* Individuals or Households.

*Frequency:* Annually.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Ms. Jasmeet Sehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.



*DOD Clearance Officer:* Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at [whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil](mailto:whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil).

Dated: November 25, 2020.

**Kayyonne T. Marston,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2020–26521 Filed 11–30–20; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD–2020–OS–0098]

### Proposed Collection; Comment Request

**AGENCY:** Washington Headquarters Service (WHS), DoD.

**ACTION:** Information collection notice.

**SUMMARY:** In compliance with the *Paperwork Reduction Act of 1995*, the Washington Headquarters Service announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by February 1, 2021.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

*www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Washington Headquarters Service (WHS), Facilities Services Directorate (FSD), Enterprise Performance and IT Management Directorate (EPITMD), ATTN: Mr. Jeremy Consolvo, 1550 Crystal Drive, Arlington, VA 22202, or call the WHS/FSD/EPITMD at (703) 697–2224.

### SUPPLEMENTARY INFORMATION:

*Title; Associated Form; and OMB Number:* Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery—the Interactive Customer Evaluation (ICE) System; 0704–0420.

*Needs and Uses:* The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs,

and other matters that are commonly considered private.

*Affected Public:* Individuals and Households.

*Annual Burden Hours:* 7,631.

*Number of Respondents:* 152,622.

*Responses per Respondent:* 1.

*Annual Responses:* 152,622.

*Average Burden per Response:* 3 minutes.

*Frequency:* On occasion.

This system was developed to improve the timeliness, quality, and quantity of feedback given by customers to DoD service providers. Customers are able to access an appropriate comment card in ICE by going directly to the ICE website and search for the service provider or through a link provided by a service provider. They are able to quickly fill out a short online questionnaire related to customer satisfaction. Customer responses are sent to the appropriate facility and/or service manager. The data resides in the ICE system. This timely feedback allows service providers to quickly improve the quality of their services, thereby enhancing the quality of life for all members of the defense community. It also gives community commanders, deputy commanders in chiefs, and others an opportunity to review, assess, and improve current service quality.

Dated: November 25, 2020.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2020–26519 Filed 11–30–20; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD–2020–HA–0102]

#### Proposed Collection; Comment Request

**AGENCY:** The Office of the Assistant Secretary of Defense for Health Affairs, Department of Defense (DoD).

**ACTION:** Information collection notice.

**SUMMARY:** In compliance with the *Paperwork Reduction Act of 1995*, the Defense Health Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways

to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by February 1, 2021.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Ms. Angela James at the Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100 or call 571–372–7574.

#### SUPPLEMENTARY INFORMATION:

*Title; Associated Form; and OMB Number:* Professional Qualifications Medical/Peer Reviewers; CHAMPUS Form 780; OMB Control Number 0720–0005.

*Needs and Uses:* The information collection requirement is necessary to obtain and record the professional qualifications of medical and peer reviewers utilized within TRICARE®. The form is included as an exhibit in an appeal or hearing case file as evidence of the reviewer's professional qualifications to review the medical documentation contained in the case file.

*Affected Public:* Businesses or other for profit.

*Annual Burden Hours:* 20.

*Number of Respondents:* 60.

*Responses per Respondent:* 1.

*Annual Responses:* 60.

*Average Burden per Response:* 20 minutes.

*Frequency:* On occasion.

Dated: November 25, 2020.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2020–26522 Filed 11–30–20; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID DoD–2020–OS–0072]

#### Submission for OMB Review; Comment Request

**AGENCY:** Defense Counterintelligence and Security Agency (DCSA), Department of Defense (DoD).

**ACTION:** 30-Day information collection notice.

**SUMMARY:** The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

**DATES:** Consideration will be given to all comments received by December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

#### FOR FURTHER INFORMATION CONTACT:

Angela James, 571–372–7574, or [whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil](mailto:whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil).

#### SUPPLEMENTARY INFORMATION:

*Title; Associated Form; and OMB Number:* Standard Form 87 Fingerprint Charts; SF 87; OMB Control Number 0705–0002.

*Type of Request:* Revision.

*Number of Respondents:* 51,800.

*Responses per Respondent:* 1.

*Annual Responses:* 51,800.

*Average Burden per Response:* 5 minutes.

*Annual Burden Hours:* 4,317.

*Needs and Uses:* The SF 87 is a fingerprint card, which is utilized to conduct a national criminal history check, which is a component of the background investigation. The SF 87 is completed by applicants who are under consideration for Federal employment; by Federal employees, to determine whether they should be retained in such

employment; by individuals being considered to perform work for the Federal Government under a Government contract or to continue such work; and by persons seeking long-term access to Federal facilities and systems. The SF 87 fingerprint chart is used in background investigations to help establish facts required to determine, for example, whether the subject of the investigation should be adjudicated to be eligible for logical and physical access to Government facilities and systems; suitable or fit for Federal employment; fit to perform work on behalf of the Federal Government under a Government contract; eligible to hold a position that is sensitive for national security reasons; or eligible for access to classified information. The SF 87 form is utilized only in instances in which electronic collection capabilities are unavailable.

*Affected Public:* Individuals or Households.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain or retain benefits.

*OMB Desk Officer:* Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

*DOD Clearance Officer:* Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at [whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil](mailto:whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil).

Dated: November 25, 2020.

**Kayyonne T. Marston**,  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

[FR Doc. 2020-26518 Filed 11-30-20; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD-2020-OS-0099]

### Proposed Collection; Comment Request

**AGENCY:** The Office of the Under Secretary of Defense for Policy, Department of Defense (DoD).

**ACTION:** Information collection notice.

**SUMMARY:** In compliance with the *Paperwork Reduction Act of 1995*, the Office of the Under Secretary of Defense for Policy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by February 1, 2021.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* DoD cannot receive written comments at this time due to the COVID-19 pandemic. Comments should be sent electronically to the docket listed above.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Ms. Angela James at the Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate,

Directives Division, 4800 Mark Center Drive, Suite 03F09-09, Alexandria, VA 22350-3100 or call 571-372-7574.

### SUPPLEMENTARY INFORMATION:

*Title; Associated Form; and OMB Number:* Policy Pulse Survey, OMB Control Number 0704-0570.

*Needs and Uses:* The information collection requirement is necessary to obtain and record responses from contractor personnel employed within the Office of the Under Secretary of Defense for Policy and its components. The survey results are analyzed by the Leadership and Organizational Development Office to assess the progress of the current human capital strategy and to address emerging human capital and training issues.

*Affected Public:* Individuals or households.

*Annual Burden Hours:* 76.5.

*Number of Respondents:* 153.

*Responses per Respondent:* 2.

*Annual Responses:* 306.

*Average Burden per Response:* 15 minutes.

*Frequency:* Semi-annually.

Dated: November 25, 2020.

**Aaron T. Siegel**,

Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

[FR Doc. 2020-26523 Filed 11-30-20; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD-2020-OS-0101]

### Proposed Collection; Comment Request

**AGENCY:** Office of the Undersecretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

**ACTION:** Information collection notice.

**SUMMARY:** In compliance with the *Paperwork Reduction Act of 1995*, the Office of the Undersecretary of Defense for Acquisition and Sustainment announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the

burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by February 1, 2021.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* The DoD cannot receive written comments at this time due to the COVID-19 pandemic. Comments should be sent electronically to the docket listed above.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to OUSD(A&S) Chief Information Security Office, 3015 Defense Pentagon, Washington, DC. Attn: Ms. Katherine Arrington, 703-695-9332.

**SUPPLEMENTARY INFORMATION:**

*Title; Associated Form; and OMB Number:* Trusted Capital Digital Marketplace Application; OMB Control Number 0704-XXXX.

*Needs and Uses:* Per the authority vested in the Secretary of Defense (SECDEF) by Section 1711 of the National Defense Authorization Act of 2018, the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)) has proposed a “Trusted Capital” initiative in the form of a public-private partnership designed to convene trusted sources of private capital with innovative companies critical to the defense industrial base (DIB) and national security. The initiative includes establishment of a Trusted Capital Digital Marketplace (TCDM) to facilitate business relationships between eligible investors (“Capital Providers”) and eligible small and medium-sized businesses that have been “down-selected” by Department of Defense (DoD) Components based on relevancy, technical merit, business viability, or innovativeness (“Capability Providers”).

The COVID-19 pandemic highlighted the criticality of the security and resiliency of defense supply chains. The Federal emergency enabled DoD to accelerate initiatives to identify constraints and risks in our supply chains that were initially identified in the Executive Order (E.O.) 13806 report, which was published in 2018. One of the risk archetypes identified in the report is foreign dependency on capital and supply chains. Although DoD will always have a diverse, domestic and international supply chain, we recognize that this comes with some risk. COVID-19 magnified that risk and the difficulties of offshore sources of capital and supply in times of global emergencies. The OUSD(A&S) Trusted Capital program offers critical technology companies an alternative to adversarial capital. To accomplish this important national security mission the Trusted Capital program requires the ability to gather data required to conduct national security and supply chain due-diligence to prioritize “trusted” sources of commercial capital to offset direct financial distress in the DIB and support our partners affected by the virus with investments and local job creation. Information collected will be used in determining an applicant’s eligibility for TCDM participation. Parties will complete an electronic application and be subjected to a due diligence screening process to assess for adversarial foreign ownership, influence, or control—as well as other national security risks. In the event additional information is necessary to process an application, additional inquiries may be sent to the applicant. Applicants that receive a favorable due diligence screening adjudication by OUSD(A&S) will be approved for TCDM participation. In addition to initial application requirements, participants will be subject to continuous reporting obligations.

*Affected Public:* Business or other for-profit.

*Annual Burden Hours:* 450 hours.

*Number of Respondents:* 300.

*Responses per Respondent:* 1.

*Annual Responses:* 300.

*Average Burden per Response:* 1.5 hours.

*Frequency:* Annually.

Dated: November 25, 2020.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2020-26524 Filed 11-30-20; 8:45 am]

**BILLING CODE 5001-06-P**

**DEPARTMENT OF EDUCATION**

[Docket No.: ED-2020-SCC-0148]

**Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Office of State Support Progress Check Quarterly Protocol**

**AGENCY:** Office of Elementary and Secondary Education (OESE), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

**DATES:** Interested persons are invited to submit comments on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection request by selecting “Department of Education” under “Currently Under Review,” then check “Only Show ICR for Public Comment” checkbox.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Tanesha Hembrey, 202-260-1719.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public’s reporting burden. It also helps the public understand the Department’s information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the

respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Office of State Support Progress Check Quarterly Protocol.

*OMB Control Number:* 1810-0733.

*Type of Review:* An extension without change of a currently approved collection.

*Respondents/Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 53.

*Total Estimated Number of Annual Burden Hours:* 636.

*Abstract:* The Office of School Support and Accountability (SSA) administers Title I, Sections 1001-1004 (School Improvement); Title I, Part A (Improving Basic Programs Operated by Local Educational Agencies); Title I, Part B (Enhanced Assessments Grants (EAG), and Grants for State Assessments and Related Activities); Title II, Part A (Supporting Effective Instruction); Title III, Part A (English Language Acquisition, Language Enhancement, and Academic Achievement); and School Improvement Grants (SIG). Quarterly progress checks, phone or in-person conversations every three months of a fiscal year with State directors and coordinators, help ensure that State Educational Agencies (SEAs) are making progress toward increasing student achievement and improving the quality of instruction for all students through regular conversations about the quality of SEA implementation of SSA administered programs. The information shared with the SSA helps inform the selection and delivery of technical assistance to SEAs and aligns structures, processes, and routines so the SSA can regularly monitor the connection between grant administration and intended outcomes. Progress checks also allow the SSA to proactively engage with SEAs to identify any issues ahead of formal monitoring visits, decreasing the need for enforcement actions and minimizing burden for SEAs. ED will collect this data from the 53 grantees that receive the grants listed above to inform its review of grantee implementation, outcomes, oversight, and accountability. In order to allow for a comprehensive program review of SSA grantees, we are requesting a three-year clearance with this form.

Dated: November 25, 2020

**Kate Mullan,**

*PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.*

[FR Doc. 2020-26458 Filed 11-30-20; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF ENERGY

### Bonneville Power Administration

[BPA File No.: BP-22]

#### Fiscal Year (FY) 2022-2023 Proposed Power and Transmission Rate Adjustments Public Hearing and Opportunities for Public Review and Comment

**AGENCY:** Bonneville Power Administration (Bonneville or BPA), Department of Energy (DOE).

**ACTION:** Notice of FY 2022-2023 proposed power and transmission rate adjustments.

**SUMMARY:** Bonneville is initiating a rate proceeding under the Northwest Power Planning and Conservation Act (Northwest Power Act) to establish power, transmission, and ancillary and control area services rates for the period from October 1, 2021, through September 30, 2023. Bonneville has designated this proceeding Docket No. BP-22.

#### DATES:

*Prehearing Conference:* The BP-22 proceeding begins with a prehearing conference at 9:00 a.m. on Monday, December 7, 2020, which will be held telephonically. Interested parties may obtain the call-in information by accessing Bonneville's BP-22 rate case web page at [www.bpa.gov/goto/BP22](http://www.bpa.gov/goto/BP22) or by contacting the Hearing Clerk at [BP22clerk@gmail.com](mailto:BP22clerk@gmail.com).

*Intervention:* Anyone intending to become a party to the BP-22 proceeding must file a petition to intervene on Bonneville's secure website. Petitions to intervene may be filed beginning on the date of publication of this Notice and are due no later than 4:30 p.m. on Tuesday, December 8, 2020. Part III of this notice, "Public Participation in BP-22," provides details on requesting access to the secure website and filing a petition to intervene.

#### ADDRESSES:

*Participant Comments:* Written comments by non-party participants must be received by March 1, 2021, to be considered in the Administrator's Record of Decision (ROD). Part III of this

notice, "Public Participation in BP-22," provides details on submitting participant comments.

**FOR FURTHER INFORMATION CONTACT:** Ms. Abigail Rhoads, DKE-7, BPA Communications, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208; by phone toll-free at 1-800-622-4519; or by email to [amhoward@bpa.gov](mailto:amhoward@bpa.gov).

The Hearing Clerk for this proceeding can be reached via email at [BP22clerk@gmail.com](mailto:BP22clerk@gmail.com) or via telephone at (503) 960-8722.

Please direct questions regarding Bonneville's secure website to the Hearing Coordinator via email at [cwgriffen@bpa.gov](mailto:cwgriffen@bpa.gov) or, if the question is time-sensitive, via telephone at (503) 230-3107.

*Responsible Officials:* Mr. Daniel H. Fisher, Power Rates Manager, is the official responsible for the development of Bonneville's power rates, and Ms. Rebecca E. Fredrickson, Manager of Transmission Rates, Tariff and Regulatory, is the official responsible for the development of Bonneville's transmission, ancillary, and control area services rates.

#### SUPPLEMENTARY INFORMATION:

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Part I. Introduction and Procedural Matters  
Part II. Scope of BP-22 Rate Proceeding  
Part III. Public Participation in BP-22  
Part IV. Summary of Rate Proposals  
Part V. Proposed BP-22 Rate Schedules

#### Part I—Introduction and Procedural Matters

##### A. Introduction and Procedural Matters

The Northwest Power Act provides that Bonneville must establish, and periodically review and revise, its power and transmission rates so that they recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including amortization of the Federal investment in the Federal Columbia River Power System (FCRPS) over a reasonable number of years, and Bonneville's other costs and expenses. Section 7(i) of the Northwest Power Act requires that Bonneville's rates be established according to certain procedures, including publication in the **Federal Register** of a notice of the proposed rates; one or more hearings conducted as expeditiously as practicable by a Hearing Officer; opportunity for both oral presentation and written submission of views, data, questions, and arguments related to the proposed rates; and a decision by the Administrator based on the record.

Bonneville is conducting the BP–22 proceeding to establish rates for FY 2022–2023.

Bonneville's Rules of Procedure will govern the BP–22 proceeding. The rules are posted on Bonneville's website at <https://www.bpa.gov/Finance/RateCases/RulesProcedure/Pages/.aspx> and published in the **Federal Register**, 83 FR 39993 (Aug. 13, 2018).

#### *B. Proposed Procedural Schedule*

A proposed schedule for the BP–22 proceeding is provided below. The official schedule will be established by the Hearing Officer and may be amended by the Hearing Officer as needed during the proceeding.

Prehearing Conference—December 7, 2020

BPA Files Initial Proposal—December 7, 2020

Deadline for Petitions to Intervene—December 8, 2020

Clarification—December 18, 2020, January 6–7, 2021

Motions to Strike Due—January 15, 2021

Data Request Deadline—January 15, 2021

Answers to Motions to Strike Due—January 22, 2021

Data Response Deadline—January 22, 2021

Parties File Direct Cases—February 3, 2021

Clarification—February 9–10, 2021

Motions to Strike Due—February 16, 2021

Data Request Deadline—February 16, 2021

Answers to Motions to Strike Due—February 23, 2021

Data Response Deadline—February 23, 2021  
Close of Participant Comments—March 1, 2021

Litigants File Rebuttal Cases—March 16, 2021

Clarification—March 22, 2021

Motions to Strike Due—March 26, 2021

Data Request Deadline—March 26, 2021

Answers to Motions to Strike Due—April 2, 2021

Data Response Deadline—April 2, 2021

Parties Give Notice of Intent to Cross-Examine—April 5, 2021

Cross-Examination—April 8–9, 2021

Initial Briefs Filed—April 27, 2021

Oral Argument—May 4, 2021

Draft ROD Issued—June 11, 2021

Briefs on Exceptions Filed—June 25, 2021

Final ROD and Final Studies Issued—July 28, 2021

#### *C. Ex Parte Communications*

Section 1010.5 of Bonneville's Rules of Procedure prohibits *ex parte* communications. *Ex parte* communications include any oral or written communication (1) relevant to the merits of any issue in the proceeding; (2) that is not on the record; and (3) with respect to which reasonable prior notice has not been given. The *ex parte* rule applies to communications with all Bonneville and DOE employees and contractors, the Hearing Officer, and the Hearing Clerk during the proceeding. Except as provided, any

communications with persons covered by the rule regarding the merits of any issue in the proceeding by other executive branch agencies, Congress, existing or potential Bonneville customers, nonprofit or public interest groups, or any other non-DOE parties are prohibited. The rule explicitly excludes and does not prohibit communications (1) relating to matters of procedure; (2) otherwise authorized by law or the Rules of Procedure; (3) from or to the Federal Energy Regulatory Commission (Commission); (4) that all litigants agree may be made on an *ex parte* basis; (5) in the ordinary course of business, about information required to be exchanged under contracts, or in information responding to a Freedom of Information Act request; (6) between the Hearing Officer and Hearing Clerk; (7) in meetings for which prior notice has been given; or (8) as otherwise specified in Section 1010.5(b) of Bonneville's Rules of Procedure. The *ex parte* rule remains in effect until the Administrator's Final ROD is issued.

#### **Part II—Scope of BP–22 Rate Proceeding**

##### *A. Joint Rate Proceeding*

The BP–22 proceeding is a joint proceeding for the adoption of both power and transmission rates for FY 2022–2023. A summary of the proposal for Bonneville's power and transmission rates is provided in Part IV of this notice.

##### *B. 2020 Integrated Program Review*

Bonneville began its 2020 Integrated Program Review (IPR) process in June 2020. The IPR process is designed to allow the public an opportunity to review and comment on Bonneville's proposed expense and capital spending level estimates before the spending levels are used to set rates. On September 30, 2020, Bonneville issued the Final Close-Out Report for the IPR process, which establishes the expense and capital program level cost estimates that are used in the BP–22 Initial Proposal. At the discretion of the Administrator, Bonneville may hold additional processes to review these estimates outside of this rate proceeding.

##### *C. Scope of the BP–22 Proceeding*

This section provides guidance to the Hearing Officer regarding the scope of the rate proceeding and identifies specific issues that are outside the scope. In addition to the issues specifically listed below, any other issue that is not a ratemaking issue is outside the scope of this proceeding.

Bonneville may revise the scope of the proceeding to include new issues that arise as a result of circumstances or events occurring outside the proceeding that are substantially related to the rates under consideration in the proceeding. See Rules of Procedure, Section 1010.4(b)(8)(iii), (iv). If Bonneville revises the scope of the proceeding to include new issues, Bonneville will provide public notice on its website, present testimony or other information regarding such issues, and provide a reasonable opportunity to intervene and respond to Bonneville's testimony or other information. *Id.*

##### **1. Program Cost Estimates**

Bonneville's projections of its program costs and spending levels are not determined in rate proceedings. These projections are determined by Bonneville in other forums, such as the IPR process described above, with input from stakeholders. In addition, Bonneville depreciates the capital spending on the Federal power and transmission system over the service lives of the associated assets. Transmission's depreciation is based on a depreciation study calculated consistent with industry standards. The service lives of power and transmission assets as well as the depreciation study and resulting depreciation rates are not determined in rate proceedings.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that challenges the appropriateness or reasonableness of the Administrator's decisions on cost and spending levels, including decisions on the depreciation rates that are used to calculate depreciation expense. If any re-examination of spending levels is necessary, such re-examination will occur outside of the rate proceeding. The above exclusion does not extend to those portions of the revenue requirement related to the following: (1) Interest rate forecasts, (2) interest expense and credit, (3) Treasury repayment schedules, (4) calculation of depreciation and amortization expense, (5) forecasts of system replacements used in repayment studies, (6) purchased power expenses, (7) transmission cost incurred by Power Services, (8) generation cost incurred by Transmission Services, (9) minimum required net revenue, and (10) the costs of risk mitigation actions resulting from the expense and revenue uncertainties included in the risk analysis.

## 2. Federal and Non-Federal Debt Service and Debt Management

During the 2020 IPR process and in other forums, Bonneville provided the public with background information on Bonneville's internal Federal and non-Federal debt management policies and practices. While these policies and practices are not decided in the IPR process, these discussions were intended to inform interested parties about these matters so the parties would better understand Bonneville's debt structure. Bonneville's debt management policies and practices remain outside the scope of the rate proceeding.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to address the appropriateness or reasonableness of Bonneville's debt management policies and practices. This exclusion does not encompass how debt management actions are reflected in ratemaking.

## 3. Financial and Accounting Policies and Practices

Bonneville published its third Financial Plan in 2018, outlining objectives to help strengthen the agency's financial health and resiliency. The Financial Plan focused on four main areas: Cost management; debt utilization; debt capacity; and liquidity. Since publishing the Plan, Bonneville has adopted certain financial policies to help further its financial objectives. Bonneville's Financial Reserves Policy establishes lower and upper thresholds for agency and business line financial reserves and parameters for actions to be taken when financial reserves are above or below the thresholds. Bonneville's Leverage Policy provides guidance on managing the agency's and business lines' debt-to-asset ratios and establishes near-term, mid-term, and long-term targets for agency and business line ratios. The terms of Bonneville's Financial Plan and Policies, along with Bonneville's internal financial and accounting policies and practices, are outside the scope of the BP-22 proceeding.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to visit or revisit the terms of Bonneville's Financial Plan, Financial Reserves Policy, Leverage Policy, internal financial and accounting policies and practices, and previous

decisions regarding the adoption and implementation of the Financial Plan and Policies in the BP-18 ROD, the Financial Reserves Policy Phase-In ROD, the Leverage Policy ROD, and the BP-20E ROD.

## 4. Tiered Rate Methodology (TRM)

The TRM restricts Bonneville and its customers with Contract High Water Mark (CHWM) contracts from proposing changes to the TRM's ratemaking guidelines unless certain procedures have been successfully concluded. No proposed changes have been subjected to the required procedures.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to propose revisions to the TRM made by Bonneville, customers with CHWM contracts, or their representatives. This exclusion does not extend to a party or customer that does not have a CHWM contract.

## 5. Rate Period High Water Mark (RHWM) Process

The RHWM Process preceded the start of the BP-22 proceeding. In that process, as directed by the TRM, Bonneville established FY 2022-2023 RHWMs for Public customers that signed contracts for firm requirements power service providing for tiered rates, referred to as CHWM contracts. Bonneville established the maximum planned amount of power a customer is eligible to purchase at Tier 1 rates during the rate period, the Above-RHWM Loads for each customer, the System Shaped Load for each customer, the Tier 1 System Firm Critical Output, RHWM Augmentation, the Rate Period Tier 1 System Capability (RT1SC), and the monthly/diurnal shape of RT1SC. The RHWM Process provided customers an opportunity to review, comment on, and challenge Bonneville's RHWM determinations.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to visit or revisit Bonneville's determination of a customer's FY 2022-2023 RHWM or other RHWM Process determinations.

## 6. 2008 Average System Cost Methodology (2008 ASCM) and Average System Cost Determinations

Section 5(c) of the Northwest Power Act established the Residential Exchange Program, which provides benefits to residential and farm

consumers of Pacific Northwest utilities based, in part, on a utility's "average system cost" (ASC) of resources. The 2008 ASCM is not subject to challenge or review in a Section 7(i) proceeding. Determinations of the ASCs of participating utilities are made in separate processes conducted pursuant to the ASCM. Those processes began with ASC filings on July 1, 2020, and are continuing through July 2021.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to visit or revisit the appropriateness or reasonableness of the 2008 ASCM or of any of the ongoing ASC determinations.

## 7. 2012 Residential Exchange Program Settlement Agreement (2012 REP Settlement)

On July 26, 2011, the Administrator executed the 2012 REP Settlement, which resolved longstanding litigation over Bonneville's implementation of the Residential Exchange Program (REP) under Section 5(c) of the Northwest Power Act, 16 U.S.C. 839c(c). The Administrator's findings regarding the legal, factual, and policy challenges to the 2012 REP Settlement are explained in the REP-12 Record of Decision (REP-12 ROD). The Administrator's decisions regarding the 2012 REP Settlement and REP-12 ROD were upheld by the U.S. Court of Appeals for the Ninth Circuit in *Association of Public Agency Customers v. Bonneville Power Administration*, 733 F.3d 939 (9th Cir. 2013). Challenges to Bonneville's decision to adopt the 2012 REP Settlement and implement its terms in Bonneville's rate proceedings are not within the scope of this proceeding.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to visit or revisit in this rate proceeding Bonneville's determination to adopt the 2012 REP Settlement or its terms.

## 8. Service to the Direct Service Industries (DSIs)

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to revisit the appropriateness or reasonableness of Bonneville's decisions regarding service to the DSIs, including Bonneville's decision to offer contracts to the DSIs and the method, level of service, or other terms embodied in the existing DSI contracts.



#### 9. Operation and Maintenance of the Power and Transmission Systems

Bonneville, in coordination with other Federal entities, operates and maintains the Federal Columbia River power and transmission systems in accordance with good utility practice and with applicable reliability standards and operating requirements. Bonneville's power and transmission systems operation and maintenance practices and protocols, such as dispatcher standing orders, operating instructions, reliability of the system, compliance programs, and other operating requirements, are non-rate matters.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to address issues regarding operation and maintenance practices and protocols.

#### 10. Terms and Conditions of Transmission Service

Bonneville offers and provides transmission services, including interconnection service, and ancillary and control area services in accordance with the terms and conditions specified in its open access transmission tariff (Tariff), business practices, and applicable contracts. In addition to and concurrent with this rate proceeding, Bonneville is initiating the TC-22 proceeding to modify the Tariff terms and conditions. Bonneville's business practices provide implementation details for the Tariff. Bonneville's decisions regarding the business practices are determined in other forums and follow the procedures in Bonneville's Business Practice Process posted on its website. The Tariff terms and conditions, business practices, and the contracts and contract disputes between Bonneville and its customers are outside the scope of the BP-22 rate proceeding.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to address issues regarding terms and conditions of transmission service, including interconnection service, and ancillary and control area services. This includes, but is not limited to, argument, testimony, or other evidence regarding Bonneville's decisions whether to offer particular transmission services, the terms and conditions for participating in the EIM, the procedures and standards for modifications to

Bonneville's Tariff or business practices, and whether to include certain terms and conditions in the Tariff or in business practices.

#### 11. Oversupply Management Protocol

The proposed OS-22 Oversupply rate is a formula rate designed to recover Bonneville's oversupply costs. Bonneville incurs oversupply costs pursuant to the Oversupply Management Protocol, Attachment P of Bonneville's Tariff. Under the proposed formula rate, Bonneville would recover actual costs incurred during the BP-22 rate period rather than forecast costs.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to address the terms of the Oversupply Management Protocol; whether the Oversupply Management Protocol complies with orders of the Commission; and whether Bonneville took all actions to avoid using the Oversupply Management Protocol, including the payment of negative prices to generators outside of Bonneville's balancing authority area. This exclusion does not extend to issues concerning the rates for recovering the costs of the Oversupply Management Protocol.

#### 12. Energy Imbalance Market Policy Decisions

Since 2018, Bonneville has been exploring whether to join the Western Energy Imbalance Market (EIM). The EIM is an extension of the California Independent System Operator's (CAISO) real-time market. It economically dispatches resources that elect to participate in the EIM to solve for the energy imbalance of participating Balancing Authority Areas (BAAs), consistent with transmission and system constraints. Following an extensive public process, on September 26, 2019, Bonneville issued the Energy Imbalance Market Policy Administrator's Record of Decision, in which the Administrator made a number of policy decisions related to Bonneville's potential participation in the EIM. Later, on October 30, 2020 following another public process, Bonneville issued a follow-on decision document, the EIM Phase III Final Decision Document, addressing other policy issues related to Bonneville's potential EIM participation. Further, Bonneville will make its final decision on whether to join the EIM in a separate process that is expected to begin following completion of this case. None of these

decisions are within the scope of the BP-22 proceeding.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to raise or revisit the issues or decisions addressed in the Energy Imbalance Market Policy Administrator's Record of Decision or Phase III EIM Decision Document. In addition, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks to address whether Bonneville should join the EIM. This exclusion does not extend to issues concerning the recovery or distribution of EIM-related costs or credits, which are within the scope of the BP-22 proceeding.

#### 13. Potential Environmental Impacts, Biological Constraints, and Related Operations

Environmental impacts are addressed in a National Environmental Policy Act (NEPA) process Bonneville conducts concurrent with the rate proceeding. See Section II.D of this notice. In addition, biological constraints on hydropower operations are determined outside of the rate case through intra-agency consultations under the Endangered Species Act, 16 U.S.C.1536(a)(2). Finally, implementation of the decision regarding operations, maintenance and configuration of the Columbia River System evaluated in the Columbia River System Operations Environmental Impact Statement (CRSO EIS) and associated joint Record of Decision with the U.S. Army Corps of Engineers and Bureau of Reclamation are also not issues to be addressed in this proceeding.

Pursuant to Section 1010.4(a)(8) of Bonneville's Procedures, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to address the potential environmental impacts of the rates being developed in this rate proceeding, potential biological effects of operations modeled in the proceeding, the appropriate hydroelectric constraints defined in these environmental compliance processes, or the operations, maintenance, and configuration, assumptions, studies, decisions, or matters addressed in the CRSO EIS or CRSO EIS joint Record of Decision.



### *D. The National Environmental Policy Act*

Bonneville is in the process of assessing the potential environmental effects of its proposed power and transmission rate adjustments, consistent with NEPA. The NEPA process is conducted separately from the rate proceeding. As discussed above, all evidence and argument addressing potential environmental impacts of the rate adjustments being developed in the BP-22 rate proceeding are excluded from the rate proceeding record. Instead, comments on environmental effects should be directed to the NEPA process.

Based on its most current assessment of the proposed power and transmission rate adjustments, Bonneville believes this proposal may be the type of action typically excluded from further NEPA review pursuant to U.S. Department of Energy NEPA regulations, which apply to Bonneville. More specifically, the proposal appears to solely involve changes to Bonneville's rates and other cost recovery and management mechanisms to ensure that there are sufficient revenues to meet Bonneville's financial obligations and other costs and expenses, while using existing generation sources operating within normal limits. As such, it appears this rate proposal falls within Categorical Exclusion B4.3, found at 10 CFR part 1021, subpart D, app. B4.3 (2015), which provides for the categorical exclusion from further NEPA review of "[r]ate changes for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements if the operations of generation projects would remain within normal operating limits."

Nonetheless, Bonneville is still assessing the proposal, and, depending upon the ongoing environmental review, Bonneville may instead issue another appropriate NEPA document. Comments regarding the potential environmental effects of the proposal may be submitted to Katey Grange, NEPA Compliance Officer, EC-4, Bonneville Power Administration, 905 NE 11th Avenue, Portland, Oregon 97232, and to [kcgrange@bpa.gov](mailto:kcgrange@bpa.gov). Any such comments received by the comment deadline for Participant Comments identified in Section III.A of this notice will be considered by Bonneville's NEPA compliance staff in the NEPA process that is being conducted for this proposal.

### **Part III—Public Participation in BP-22**

#### *A. Distinguishing Between "Participants" and "Parties"*

Bonneville distinguishes between "participants in" and "parties to" the BP-22 proceeding. Separate from the formal hearing process, Bonneville will receive written comments, views, opinions, and information from participants who may submit comments without being subject to the duties of, or having the privileges of, parties. Participants are not entitled to participate in the prehearing conference; may not cross-examine parties' witnesses, seek discovery, or serve or be served with documents; and are not subject to the same procedural requirements as parties. Bonneville customers whose rates are subject to this proceeding, or their affiliated customer groups, may not submit participant comments. Members or employees of organizations that have intervened in the proceeding may submit participant comments as private individuals (that is, not speaking for their organizations) but may not use the comment procedures to address specific issues raised by their intervenor organizations.

Written comments by participants will be included in the record and considered by the Administrator if they are received by March 1, 2021. Participants should submit comments through Bonneville's website at [www.bpa.gov/comment](http://www.bpa.gov/comment) or by hard copy to: BPA Public Involvement, DKE-7, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208. All comments should contain the designation "BP-22" in the subject line.

#### *B. Interventions*

Any entity or person intending to become a party in the BP-22 proceeding must file a petition to intervene through Bonneville's secure website (<https://www.bpa.gov/secure/Ratecase/>). A first-time user of Bonneville's secure website must create a user account to submit an intervention. Returning users may request access to the BP-22 proceeding through their existing accounts, and may submit interventions once their permissions have been updated. The secure website contains a link to the user guide, which provides step-by-step instructions for creating user accounts, generating filing numbers, submitting filings, and uploading interventions. Please contact the Hearing Coordinator via email at [cwgriffen@bpa.gov](mailto:cwgriffen@bpa.gov) or, if the question is time-sensitive, via telephone at (503) 230-3107 with any questions regarding the submission process. A petition to intervene must conform to the format and content requirements set

forth in Bonneville's Rules of Procedure Sections 1010.6 and 1010.11 and must be uploaded to the BP-22 proceeding secure website by the deadline established in the procedural schedule.

A petition to intervene must state the name and address of the entity or person requesting party status and the entity or person's interest in the hearing. Bonneville customers and affiliated customer groups will be granted intervention based on petitions filed in conformance with the Rules of Procedure. Other petitioners must explain their interests in sufficient detail to permit the Hearing Officer to determine whether the petitioners have a relevant interest in the hearing. The deadline for opposing a timely intervention is two business days after the deadline for filing petitions to intervene. Bonneville or any party may oppose a petition for intervention. All petitions will be ruled on by the Hearing Officer. Late interventions are strongly disfavored. Opposition to an untimely petition to intervene must be filed within two business days after service of the petition.

#### *C. Developing the Record*

The hearing record will include, among other things, the transcripts of the hearing, written evidence and argument entered into the record by Bonneville and the parties, written comments from participants, and other material accepted into the record by the Hearing Officer. The Hearing Officer will review and certify the record to the Administrator for final decision.

The Administrator will develop final rates based on the record and such other materials and information as may have been submitted to or developed by the Administrator. The Final ROD will be made available to all parties. Bonneville will file its rates with the Commission for confirmation and approval after issuance of the Final ROD.

### **Part IV—Summary of Rate Proposals**

#### *A. Rate Proposals Affecting Power and Transmission Rates*

Bonneville will be introducing a number of rate proposals that will affect power and transmission rates for the BP-22 rate period.

##### **1. Energy Imbalance Market (EIM) Rate Proposals**

Since 2018, Bonneville has been exploring whether to join the Western Energy Imbalance Market (EIM), which is an extension of the California Independent System Operator's (CAISO) real-time market. Currently, six regional BAAs have joined the EIM. The EIM is

operated by the CAISO, which uses market software to economically dispatch participating generation resources to balance supply, transfers between balancing authority areas (interchange), and load across the market's footprint, while also simultaneously ensuring generation and transmission limitations are respected. For balancing authorities in the EIM (EIM Entities), the EIM replaces the Energy Imbalance and Generator Imbalance services under the EIM Entities' respective Open Access Transmission Tariffs. In September of 2019, following an extensive public process, Bonneville issued the Energy Imbalance Market Policy Administrator's Record of Decision, in which the Administrator made a number of policy decisions related to Bonneville's potential participation in the EIM and signed an EIM Implementation Agreement—a first step to joining the EIM. In that ROD, Bonneville explained its intent to continue through the EIM evaluation process, with the expectation that a final decision on EIM participation would be made in 2021 after the completion of BP-22 rate case. If Bonneville decides to join the EIM, actual participation is projected to begin in March of 2022. To position Bonneville to join the EIM by March 2022, Bonneville must set its rates for the BP-22 rate period to recover or distribute EIM-related costs and credits. Thus, a major portion of the BP-22 rate case will be dedicated to developing the cost allocations, methodologies, and rate schedule language necessary to facilitate potential Bonneville participation in the EIM in 2022.

## 2. Compensation for Real Power Losses

Bonneville provides two loss settlement methods for customers wheeling non-Federal resources over the Federal transmission system. Customers may opt to return losses 168 hours (one week) after the original wheeling transaction ("in-kind loss returns"), or may purchase the losses from Bonneville ("financial settlement"). Bonneville has identified and calculated a capacity cost associated with each method and is proposing charges applicable to wheeling customers to recover capacity costs. For in-kind loss returns, the proposed capacity charge is included in the transmission rate schedules. For financial settlements, the proposed power rate for purchasing losses from Bonneville includes an energy charge and a capacity charge. In addition, the transmission rate schedules include a proposed penalty rate designed to incent accurate and

timely return of in-kind loss return obligations.

## 3. Revenue Financing

Bonneville is proposing to include the cost of revenue financing in power rates to provide longer-term benefits to power customers. The amount of revenue financing included in power rates would be set at a level that would keep the PF Tier 1 Rate flat relative to the BP-20 rates—a zero percent base rate increase. For the Initial Proposal, Bonneville is proposing to include an average of \$95 million per year in revenue financing for capital projects.

For Transmission Rates, Bonneville's Initial Proposal includes an average of \$45 million per year in revenue financing to help address the financial impacts from the increasing amount of debt outstanding from funding transmission capital projects.

## B. Summary of the Power Rate Proposal

Bonneville is proposing four primary rates for Federal power sales and services, along with general rate schedule provisions to implement such rates.

### 1. Priority Firm Power Rate (PF-22)

The PF rate schedule applies to sales of firm power to public body, cooperative, and Federal agency customers to meet their requirements pursuant to Section 5(b) of the Northwest Power Act. The PF Public rate applies to the sale of Firm Requirements Power under CHWM contracts with customers taking Load Following, Block, or Slice/Block service. Consistent with the TRM, Tier 1 rates include three charges: (1) Customer charges, (2) a demand charge, and (3) a load shaping charge. In addition, two Tier 2 Short-Term rates are proposed, the Short-Term and Load Growth rates. These rates would be applicable to customers that have elected to purchase power from Bonneville for service to their Above-RHWM Load.

Because very few of Bonneville's customers are subject to exactly the same mix of PF rate components, Bonneville has developed a PF rate measure for an average customer purchasing at PF Tier 1 rates. This quantification, the Tier 1 Average Net Cost, is \$35.81/MWh for the PF-22 rate, resulting in no change from the PF-20 rate.

The Base PF Exchange rate and its associated surcharges apply to sales pursuant to Residential Purchase and Sale Agreements and Residential Exchange Program Settlement Implementation Agreements with regional utilities that participate in the

REP established under Section 5(c) of the Northwest Power Act, 16 U.S.C. 839c(c). The Base PF Exchange rate establishes the threshold for participation in the REP; only utilities with ASCs above the appropriate Base PF Exchange rate may receive REP benefits. If a utility meets the threshold, a utility-specific PF Exchange rate will be established in this proceeding for each eligible utility. The utility-specific PF Exchange rate is used in calculating the REP benefits each REP participant will receive during FY 2022–2023.

The proposed PF-22 rate schedule also includes resource support services rates for customers with non-Federal resources, and a melded PF rate for Public customers that have elected power sales contracts other than CHWM contracts for firm requirements service.

### 2. New Resource Firm Power Rate (NR-22)

The NR-22 rate applies to firm power sales to investor-owned utilities (IOUs) to meet their net requirements pursuant to Section 5(b) of the Northwest Power Act. The NR-22 rate is also applied to sales of firm power to Public customers when this power is used to serve new large single loads. In addition, the NR rate schedule includes rates for services to support Public customers serving new large single loads with non-Federal resources. In the BP-22 Initial Proposal, Bonneville is forecasting no sales at the NR rate. The average NR-22 rate in the Initial Proposal is \$77.48/MWh, a decrease of 2.8 percent from the NR-20 rate.

### 3. Industrial Firm Power Rate (IP-22)

The IP rate is applicable to firm power sales to DSI customers authorized by Section 5(d)(1)(A) of the Northwest Power Act, 16 U.S.C. 839c(d)(1)(A). The average IP-22 rate in the Initial Proposal is \$41.36/MWh, an increase of 0.9 percent compared to the IP-20 rate.

### 4. Firm Power and Surplus Products and Services Rate (FPS-22)

The FPS rate schedule is applicable to sales of various surplus power products and surplus transmission capacity for use inside and outside the Pacific Northwest. The rates for these products are negotiated between Bonneville and the purchasers. The FPS-22 rate schedule also includes rates for customers with non-Federal resources; the Unanticipated Load Service rate; rates for other capacity, energy, and scheduling products and services; and rates for reserve services for use outside the Bonneville balancing authority area. Bonneville is proposing a new FPS rate for customers that elect financial

settlement of real power losses that includes an energy charge based on a market index and a capacity charge.

#### 5. Power General Rate Schedule Provisions (GRSPs)

The Power GRSPs include general rate schedule terms and conditions applicable to Bonneville's power rates. In addition, the Power GRSPs contain special rate adjustments, charges, credits, and pass-through mechanisms for specific events and customer circumstances. Among other matters covered by the Power GRSPs are provisions related to calculating rates, resource support services, charges associated with transfer service, risk adjustments, Slice True-up, the Residential Exchange Program, conservation, payment options, and other charges.

#### C. Summary of Transmission Rates

Bonneville is proposing an overall 11.6 percent weighted average increase in transmission rates for the two-year rate period, or 5.8 percent on an average annual basis. Bonneville is proposing separate transmission rates for its Network segment, intertie segments, ancillary and control area services, and for various specific purposes.

##### 1. Network Rates

**Network Integration Transmission Rate (NT-22)**—The NT-22 rate applies to customers taking network integration service, which allows customers to flexibly serve retail load.

**Point-to-Point Rate (PTP-22)**—The PTP-22 rate is a contract demand rate that applies to customers taking Point-to-Point service on Bonneville's network. Point-to-Point service provides customers with service from identified points of receipt to identified points of delivery. There are separate rates for long-term firm service, and various increments of firm and non-firm short-term service.

**Formula Power Transmission Rate (FPT-22)**—The FPT-22 rate is based on the cost of using specific types of facilities, including a distance component for the use of transmission lines, and is charged on a contract demand basis.

##### 2. Intertie Rates

The Southern Intertie Rate (IS-22) is a contract demand rate that applies to customers taking Point-to-Point service on the Southern Intertie.

The Montana Intertie Rate (IM-22) applies to customers taking Point-to-Point service on the Eastern Intertie and that are not parties to the Montana Intertie Agreement.

The Townsend-Garrison Transmission Rate (TGT-22) applies to parties to the Montana Intertie Agreement taking firm service over Bonneville's section of the Montana Intertie.

The Eastern Intertie Rate (IE-22) applies to parties to the Montana Intertie Agreement taking non-firm service on the portion of the Eastern Intertie capacity that exceeds Bonneville's firm transmission rights.

##### 3. Other Transmission Rates and General Rate Schedule Provisions

The Use-of-Facilities Rate (UFT-22) establishes a formula rate for the use of a specific facility based on the annual cost of that facility.

The Advance Funding Rate (AF-22) allows Bonneville to collect the capital and related costs of specific facilities through an advance-funding mechanism.

The Regional Compliance Enforcement and Regional Coordinator rate (RC-22) recovers costs assessed to Bonneville for regional reliability compliance monitoring, enforcement, and reliability coordination services.

The Oversupply Rate (OS-22) recovers the costs Bonneville incurs to displace generation under the Oversupply Management Protocol, Attachment P to Bonneville's Tariff.

Other proposed transmission rates and charges include: A Utility Delivery Charge for the use of low-voltage delivery substations; a Reservation Fee for customers that postpone the service commencement date of transmission service; incremental cost rates for transmission service requests that require new facilities; a penalty charge for failure to comply with dispatch, curtailment, redispatch, or load shedding orders; an Unauthorized Increase Charge for use of the transmission system in excess of contracted-for demand; and rate adjustment mechanisms consistent with Bonneville's Financial Policies.

Bonneville's proposed transmission rates for BP-22 include two new charges associated with real power loss returns. First, Bonneville is proposing a charge to recover capacity costs associated with in-kind loss returns. The charge will apply to customers that opt for this settlement method. In addition, the Financial for Inaccuracy penalty charge is proposed to incent accurate and timely return of in-kind loss return obligations.

##### 4. Ancillary Service and Control Area Service Rates

The BP-22 Transmission Rates Proposal includes rates for Bonneville's Ancillary and Control Area Services,

along with certain updates to those rates and new rates that would be necessary if Bonneville joins the EIM. A description of the new rates and changes to existing rates is included below.

##### 1. Energy Imbalance Market Services and Rates

Bonneville proposes to adopt a series of new rates to position the agency to recover its costs, or distribute credits, if Bonneville joins the EIM beginning in March of 2022. The new rate schedules include the following:

Schedule 4E (Energy Imbalance) and Schedule 9E (Generator Imbalance). Schedule 4E will replace the current Schedule 4 (Energy Imbalance) and Schedule 9E will replace the current Schedule 9 (Generator Imbalance) when Bonneville is in the EIM. Both schedules 4E and 9E contain new terms to enable Bonneville to recover its costs or distribute credits from the EIM to loads and resources located in the Bonneville BAA.

**Interchange and Intrachange Imbalance Charges.** Interchange and Intrachange imbalance charges are new charges Bonneville is proposing to recover costs and credits associated with EIM participation. Interchange Imbalance Charges assess charges or pays credits resulting from interchange schedules that create imbalance in the EIM. Intrachange imbalance is an optional imbalance settlement that transmission customers may elect to use to align EIM costs and credits for loads and resources located within the Bonneville BAA.

**Under and Over Scheduling Penalties or Proceeds.** As a participant in the EIM, Bonneville may be assessed under or over scheduling penalties or payments. The Under-Schedule or Over Scheduling Penalty or Proceeds rate schedule describes how Bonneville intends to recover the costs or payout the proceeds from these penalties.

**EIM Neutrality and Uplift Charges and Credits.** Costs and credits not otherwise distributed by the EIM through application of the foregoing charges or credits are distributed by the CAISO to EIM Entities as neutrality and uplift costs. Bonneville will recover these costs or distribute the credits from neutrality and uplifts from the CAISO to transmission customers through new rate scheduling provisions.

##### 2. Other Changes to Ancillary and Control Area Service Rates

Bonneville is proposing changes to the Variable Energy Resource Balancing Service (VERBS), Intentional Deviation, and Persistent Deviation rates to put in

place provisions that account for a potential decision by Bonneville to join to EIM. In order to operate in the EIM, Bonneville would have to change the way it calculates balancing reserve capacity from three components (regulating, following, and imbalance) to two (regulating and non-regulating). In addition, Bonneville would be unable to offer the scheduling elections for Variable Energy Resources that it currently does, as the EIM scheduling timelines make the scheduling elections unworkable. Bonneville is proposing to update the VERBS and Intentional Deviation rates to reflect these differences.

Bonneville is also proposing changes to the Persistent Deviation rate. First, Bonneville is proposing to include the Persistent Deviation rate in a separate section of the General Rate Schedule Provisions rather than a specific provision in each of the Energy Imbalance and Generation Imbalance rate schedules. Second, Bonneville is proposing certain changes to account for the potential to join the EIM, such as extending certain timing requirements for when Persistent Deviation applies and only assessing Persistent Deviation to the portion of imbalance that affects Bonneville's operations.

#### *D. Risk Mitigation Tools*

Bonneville is proposing three rate adjustment mechanisms for BP-22 power and transmission rates, primarily to buffer against poor financial performance over the rate period and protect the agency's solvency and strong credit rating. These mechanisms implement Bonneville's Financial Reserves Policy and provide for adjustments to a business line's rates or other action in the event the business line's financial reserves for risk (Financial Reserves) fall below or exceed certain thresholds.

The Cost Recovery Adjustment Clause (CRAC) will adjust rates upward to generate additional revenue within the rate period if business line Financial Reserves fall below a defined lower threshold.

The Financial Reserves Policy Surcharge (FRP Surcharge) will also adjust rates upward to generate additional revenue within the rate period if business line Financial Reserves fall below a defined lower threshold. Bonneville is proposing to reinstate the FRP Surcharge following the suspension of the mechanism in the BP-20E proceeding and to increase the maximum Power FRP Surcharge from \$30 million to \$40 million per year, consistent with Bonneville's previous

decisions regarding the phase-in of the Financial Reserves Policy.

Finally, the Reserves Distribution Clause (RDC) will trigger if Financial Reserves exceed upper thresholds for the business line and the agency as a whole. If the RDC triggers, Bonneville will consider the amount of Financial Reserves above the threshold for rate relief or investment in high-value, business line-specific purposes such as debt retirement.

For each of the three rate adjustment mechanisms, Bonneville proposes to change the trigger metric for BP-22 from a calculation of Accumulated Calibrated Net Revenue to Reserves for Risk. In addition, Bonneville is proposing modifications to the CRAC and FRP Surcharge for both Power and Transmission rates to account for the revenue financing proposals discussed in Section IV.A.3.

#### **Part V—Proposed BP-22 Power Rate Schedules and BP-22 Transmission Rates Schedules**

Bonneville's proposed BP-22 Power Rate Schedules and BP-22 Transmission Rate Schedules, which includes Transmission, Ancillary, and Control Area Services Rate Schedules, are a part of this notice and are available for viewing and downloading on Bonneville's website at [www.bpa.gov/goto/BP22](http://www.bpa.gov/goto/BP22).

#### **Signing Authority**

This document of the Department of Energy was signed on November 19, 2020, by John L. Hairston, Acting Administrator and Chief Executive Officer of the Bonneville Power Administration, 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 November 19, 2020.

**Treena V. Garrett,**

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

[FR Doc. 2020-26016 Filed 11-30-20; 8:45 am]

**BILLING CODE 6450-01-P**

## **DEPARTMENT OF ENERGY**

### **Bonneville Power Administration**

[BPA File No.: TC-22]

#### **Proposed Modifications To Open Access Transmission Tariff; Public Hearing and Opportunities for Public Review and Comment**

**AGENCY:** Bonneville Power Administration (Bonneville), Department of Energy (DOE).

**ACTION:** Notice of public hearing and opportunity to review and comment.

**SUMMARY:** Bonneville is holding a proceeding to modify the non-rate terms and conditions of a generally applicable open access transmission tariff (Tariff). Bonneville has designated this proceeding Docket No. TC-22. The Bonneville Project Act of 1937 as reaffirmed in the Pacific Northwest Electric Power Planning and Conservation Act grants the Bonneville Administrator broad authority to enter into contracts upon such terms and conditions and in such manner as the Administrator may deem necessary. The Federal Power Act and Bonneville's Tariff provide procedures the Administrator may use to establish and modify terms and conditions of general applicability for transmission service across the Federal Columbia River Transmission System (FCRTS). By this notice, Bonneville announces the commencement of a proceeding to modify terms and conditions of the Tariff to be effective on October 1, 2021.

#### **DATES:**

*Prehearing Conference:* The TC-22 tariff proceeding will begin with a prehearing conference on Monday, December 7, 2020, which will be held telephonically.

*Intervention:* Anyone intending to become a party to the TC-22 tariff proceeding must file a petition to intervene on Bonneville's secure website. Petitions to intervene may be filed beginning on the date of publication of this Notice and are due no later than 4:30 p.m. on Tuesday, December 8, 2020.

**ADDRESSES:** Interested parties may obtain call-in information by accessing Bonneville's TC-22 tariff proceeding web page at [www.bpa.gov/goto/TC22](http://www.bpa.gov/goto/TC22) or by contacting the Hearing Clerk at [TC22clerk@gmail.com](mailto:TC22clerk@gmail.com). The TC-22 prehearing conference will begin immediately following the conclusion of the prehearing conference for Bonneville's BP-22 Power and Transmission Rate Proceeding, which begins at 9:00 a.m.

**Participant Comments:** Written comments by non-party participants must be received by March 1, 2021, to be considered in the Hearing Officer's recommended decision and the Administrator's Record of Decision (ROD).

Part III of this notice, "Public Participation in TC-22," provides details on requesting access to the secure website, filing a petition to intervene, and submitting participant comments.

**FOR FURTHER INFORMATION CONTACT:** Ms. Abigail Rhoads, DKE-7, BPA Communications, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208; by phone toll-free at 1-800-622-4519; or by email to [amhoward@bpa.gov](mailto:amhoward@bpa.gov).

The Hearing Clerk for this proceeding can be reached via email at [TC22clerk@gmail.com](mailto:TC22clerk@gmail.com) or via telephone at (503) 960-8722.

Please direct questions regarding Bonneville's secure website to the Rate Hearing Coordinator via email at [cwgriffen@bpa.gov](mailto:cwgriffen@bpa.gov) or, if the question is time-sensitive, via telephone at (503) 230-5107.

**Responsible Official:** Rebecca Fredrickson, Manager of Transmission Tariff, Rates and Regulatory Activities, is the official responsible for the development of Bonneville's open access transmission tariff.

#### SUPPLEMENTARY INFORMATION:

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Part III. Public Participation in TC-22  
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#### Part I—Introduction and Procedural Matters

##### A. Introduction and Procedural Background

Section 9 of Bonneville's Tariff provides that the Bonneville Administrator may use the procedures set forth in Section 212(i)(2)(A) of the Federal Power Act to establish and modify non-rate terms and conditions of the Tariff. The Section 212(i)(2)(A) procedures include giving notice in the **Federal Register** and conducting a hearing that adheres to the procedural requirements of paragraphs (1) through (3) of Section 7(i) of the Northwest Power Act, 16 U.S.C. 839e(i) (the same procedures Bonneville uses to set rates). In accordance with these procedures, the Hearing Officer conducts one or more hearings to develop a full and

complete record, which includes the opportunity for both oral presentation and written submission of views, data, questions, and arguments related to the proposal. Unless the Hearing Officer becomes unavailable to Bonneville, upon conclusion of the hearing, the Hearing Officer shall make a recommended decision to the Administrator, and the Administrator then makes a separate and final determination to establish or modify the Tariff terms and conditions (discussed further in Part III, Section C of this notice).

Bonneville's Rules of Procedure govern the TC-22 tariff proceedings. The rules are posted on Bonneville's website at <https://www.bpa.gov/Finance/RateCases/RulesProcedure/Pages/default.aspx> and published in the **Federal Register**, 83 FR 39993 (Aug. 13, 2018).

##### B. Proposed Procedural Schedule

A proposed schedule for the proceeding is provided below. The official schedule will be established by the Hearing Officer and may be amended by the Hearing Officer as needed during the proceeding.

Prehearing—Conference December 7, 2020  
BPA Files Initial Proposal—December 7, 2020

Deadline for Petitions to Intervene—

December 8, 2020

Clarification—December 16–17, 2020

Motions to Strike Due—January 11, 2021

Data Request Deadline—January 11, 2021

Answers to Motions to Strike Due—January 18, 2021

Data Response Deadline—January 18, 2021

Parties File Direct Cases—January 29, 2021

Clarification—February 8–9, 2021

Motions to Strike Due—February 15, 2021

Data Request Deadline—February 15, 2021

Answers to Motions to Strike Due—February 22, 2021

Data Response Deadline—February 22, 2021

Close of Participant Comments—March 1, 2021

Litigants File Rebuttal Cases—March 8, 2021

Clarification—March 12, 2021

Motions to Strike Due—March 16, 2021

Data Request Deadline—March 16, 2021

Answers to Motions to Strike Due—March 23, 2021

Data Response Deadline—March 23, 2021

Parties Give Notice of Intent to Cross-

Examine—March 24, 2021

Cross-Examination—March 29–30, 2021

Initial Briefs Filed—April 16, 2021

Oral Argument—April 26, 2021

Hearing Officer's Recommended Decision Issued—May 25, 2021

Draft ROD Issued—June 30, 2021

Briefs on Exceptions Filed—July 14, 2021

Final ROD and Final Studies Issued—July 28, 2021

##### C. Ex Parte Communications

Section 1010.5 of the Rules of Procedure prohibits *ex parte*

communications. *Ex parte* communications include any oral or written communication (1) relevant to the merits of any issue in the proceeding; (2) that is not on the record; and (3) with respect to which reasonable prior notice has not been given. The *ex parte* rule applies to communications with all Bonneville and DOE employees and contractors, the Hearing Officer, and the Hearing Clerk during the proceeding. Except as provided, any communications with persons covered by the rule regarding the merits of any issue in the proceeding by other Executive Branch agencies, Congress, existing or potential Bonneville customers, nonprofit or public interest groups, or any other non-DOE parties are prohibited. The rule explicitly excludes and does not prohibit communications (1) relating to matters of procedure; (2) otherwise authorized by law or the Rules of Procedure; (3) from or to the Federal Energy Regulatory Commission (Commission); (4) which all litigants agree may be made on an *ex parte* basis; (5) in the ordinary course of business, about information required to be exchanged under contracts, or in information responding to a Freedom of Information Act request; (6) between the Hearing Officer and Hearing Clerk; (7) in meetings for which prior notice has been given; or (8) otherwise specified in Section 1010.5(b) of the Rules of Procedure. The *ex parte* rule remains in effect until the Administrator's Final ROD is issued.

#### Part II—Scope of the TC-22 Tariff Proceeding

The TC-22 tariff proceeding is a proceeding for the adoption of modifications to the non-rate terms and conditions in Bonneville's Tariff. A summary of Bonneville's proposed Tariff modifications is provided in Part IV of this notice. This section provides guidance to the Hearing Officer regarding the specific issues that are outside the scope of the TC-22 tariff proceeding. In addition to the issues specifically listed below, any other issue that is not a Tariff term and condition issue is outside the scope of this proceeding.

Bonneville may revise the scope of the proceeding to include new issues that arise as a result of circumstances or events occurring outside the proceeding that are substantially related to the Tariff terms and conditions under consideration in the proceeding. See Rules of Procedure, Section 1010.4(b)(8)(iii), (iv). If Bonneville revises the scope of the proceeding to include new issues, Bonneville will provide public notice on its website,

present testimony or other information regarding such issues, and provide a reasonable opportunity to intervene and respond to Bonneville's testimony or other information. *Id.*

#### A. Business Practices

Bonneville's business practices provide implementation details for the Tariff and are outside the scope of the TC-22 tariff proceeding. Bonneville's decisions regarding the business practices are determined in other forums and follow the procedures in Bonneville's Business Practice Process. If business practices are developed for the proposed terms and conditions in this proceeding, such development will occur outside the terms and conditions proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that proposes or challenges Bonneville's current and future business practices.

#### B. Customer-Specific Contracts and Disputes

Contracts and contract disputes between Bonneville and its customers are outside the scope of the TC-22 tariff proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence related to contracts and contract disputes of Bonneville customers.

#### C. Oversupply Management Protocol

The Oversupply Management Protocol (Tariff Attachment P) includes the Tariff requirements and procedures used to moderate total dissolved gas levels in the Columbia River to protect endangered fish and other aquatic species. Bonneville does not propose to modify the terms of the Oversupply Management Protocol in the TC-22 tariff proceeding. The Hearing Officer is directed to exclude from the record all argument, testimony, or other evidence related to the terms of the Oversupply Management Protocol (Tariff Attachment P), including whether the Oversupply Management Protocol complies with orders of the Commission; whether Bonneville took all actions to avoid using the Oversupply Management Protocol, including the payment of negative prices to generators outside of Bonneville's balancing authority area; and issues concerning the rates for recovering the costs of the Oversupply Management Protocol.

#### D. Program Cost Estimates

Bonneville's projections of its program costs and spending levels are not determined in terms and conditions proceedings. These projections are determined by Bonneville in other forums, such as the Integrated Program Review public process, with input from stakeholders. Bonneville's decisions regarding cost projections are outside the scope of the TC-22 tariff proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that challenges the appropriateness or reasonableness of the Administrator's decisions on costs and spending levels. If any re-examination of program costs and spending levels is necessary, such re-examination will occur outside the TC-22 tariff proceeding.

#### E. Rates

Pursuant to Bonneville's statutes it must set rates to recover costs associated with providing power and transmission services. In addition to and concurrent with this proceeding, Bonneville is holding a separate Power and Transmission Rate Adjustment hearing (the BP-22 proceeding) regarding the proposed fiscal year 2022–2023 power and transmission, ancillary, and control area services rates. Bonneville's decisions regarding rates are outside the scope of the TC-22 tariff proceeding. Bonneville is publishing a separate notice in the **Federal Register** regarding the BP-22 proceeding. Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence related to rates, or that challenges the appropriateness or reasonableness of the Administrator's decisions on rates or seeks in any way to propose revisions to the rates, including rate schedules, rate schedule provisions, rate designs, rate methodologies, rate forecasts, interest expense and credit, Treasury repayment schedules, non-Federal debt repayment schedules, revenue financing, calculation of depreciation and amortization expense, forecasts of system replacements used in repayment studies, transmission acquisition expenses incurred by Power Services, generation acquisition expenses and the in-kind 168 hour delayed capacity incurred by Transmission Services, minimum required net revenue, increase in, or the use of, financial reserves, and the costs of risk mitigation actions resulting from the expense and

revenue uncertainties included in the risk analysis.

#### F. Energy Imbalance Market Policy Decisions

Since 2018, Bonneville has been exploring whether to join the Western Energy Imbalance Market (EIM). The EIM is an extension of the California Independent System Operator's (CAISO) real-time market. It economically dispatches resources that elect to participate in the EIM to solve for the energy imbalance of participating Balancing Authority Areas (BAAs), consistent with transmission and system constraints. Following an extensive public process, on September 26, 2019, Bonneville issued the Energy Imbalance Market Policy Administrator's Record of Decision, in which the Administrator made a number of policy decisions related to Bonneville's potential participation in the EIM. Later, on November 4, 2020, following another public process, Bonneville issued a follow-on decision document, the EIM Phase III Final Decision Document, addressing other policy issues related to Bonneville's potential EIM participation. Further, Bonneville will make its final decision on whether to join the EIM in a separate process that is expected to begin following completion of this case. The Energy Imbalance Market Policy Administrator's Record of Decision and the EIM Phase III Final Decision Document provided direction for the development of the EIM tariff proposals in the TC-22 proceeding, however, none of these decisions or the final decision on whether to join the EIM are within the scope of the TC-22 proceeding.

Pursuant to Section 1010.4(b)(8) of the Rules of Procedure, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to raise or revisit the issues or decisions addressed in the Energy Imbalance Market Policy Administrator's Record of Decision or the Phase III EIM Decision Document. In addition, the Administrator directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks to address whether Bonneville should join the EIM.

### Part III—Public Participation in TC-22

#### A. Distinguishing Between “Participants” and “Parties”

Bonneville distinguishes between “participants in” and “parties to” the TC-22 proceeding. Separate from the formal hearing process, Bonneville will receive written comments, views,

opinions, and information from participants, who may submit comments without being subject to the duties of, or having the privileges of, parties. Participants are not entitled to participate in the prehearing conference; may not cross-examine parties' witnesses, seek discovery, or serve or be served with documents; and are not subject to the same procedural requirements as parties. Bonneville customers who will receive transmission or interconnection service under the terms and conditions subject to this proceeding, or their affiliated customer groups, may not submit participant comments. Members or employees of organizations that have intervened in the terms and conditions proceeding may submit participant comments as private individuals (that is, not speaking for their organizations), but may not use the comment procedures to address specific issues raised by their intervenor organizations.

Written comments by participants will be included in the record and considered by the Hearing Officer and the Administrator if they are received by March 21, 2021. The proposed Tariff and attachments are provided in Section IV of this notice. Participants should submit comments through Bonneville's website at [www.bpa.gov/comment](http://www.bpa.gov/comment) or in hard copy to: BPA Public Involvement, DKE-7, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208. All comments should contain the designation "TC-22" in the subject line.

#### B. Interventions

Any entity or person intending to become a party in the TC-22 proceeding must file a petition to intervene through Bonneville's secure website (<https://www.bpa.gov/secure/Ratecase/>). A first-time user of Bonneville's secure website must create a user account to submit an intervention. Returning users may request access to the TC-22 proceeding through their existing accounts, and may submit interventions once their permissions have been updated. The secure website contains a link to the user guide, which provides step-by-step instructions for creating user accounts, generating filing numbers, submitting filings, and uploading interventions. Please contact the Hearing Coordinator via email at [cwgriffen@bpa.gov](mailto:cwgriffen@bpa.gov) or, if the question is time-sensitive, via telephone at (503) 230-5107 with any questions regarding the submission process. A petition to intervene must conform to the format and content requirements set forth in Bonneville's Rules of Procedure Sections 1010.6 and 1010.11 and must be uploaded to the TC-22 proceeding

secure website by the deadline established in the procedural schedule.

A petition to intervene must state the name and address of the entity or person requesting party status and the entity or person's interest in the hearing. Bonneville customers and affiliated customer groups will be granted intervention based on petitions filed in conformance with Rules of Procedure. Other petitioners must explain their interests in sufficient detail to permit the Hearing Officer to determine whether the petitioners have a relevant interest in the hearing. The deadline for opposing a timely intervention is two business days after the deadline for filing petitions to intervene. Bonneville or any party may oppose a petition for intervention. All petitions will be ruled on by the Hearing Officer. Late interventions are strongly disfavored. Opposition to an untimely petition to intervene must be filed within two business days after service of the petition.

#### C. Developing the Record

The hearing record will include, among other things, the transcripts of the hearing, written evidence and arguments entered into the record by Bonneville and the parties, written comments from participants, and other material accepted into the record by the Hearing Officer. Upon conclusion of the hearing, the Hearing Officer will develop a recommended decision for the Administrator. The Hearing Officer's recommended decision must be based on the record and include the Hearing Officer's findings and conclusions, including the reasons or basis thereof, on all material issues of fact, law, or discretion raised by the parties in their initial briefs. The Hearing Officer will review and certify the record to the Administrator for final decision.

The Administrator will make a final determination establishing or modifying Tariff terms and conditions based on the record, the Hearing Officer's recommended decision, and such other materials and information as may have been submitted to or developed by the Administrator. The Final ROD will be made available to all parties.

#### Part IV—Summary of Proposed Modifications to Bonneville's Tariff

In this proceeding, Bonneville proposes to modify the Tariff terms and conditions described below, to be effective on October 1, 2021.

##### 1. Transmission Studies Over the Southern Intertie (Sections 13.5, 15.2, 15.4, 17.5, 19.1)

The Tariff describes the processes Bonneville uses to offer agreements to study transmission requests when there is insufficient available transfer capability to offer service. Historically, Bonneville has not offered study agreements for service requests impacting the Southern Intertie. Bonneville is modifying study terms to describe when Bonneville will offer a study agreement for service impacting the Southern Intertie.

##### 2. Form of Service Agreement (Attachments A and F)

The Tariff includes the form of service agreement for point-to-point and network integration transmission services. Bonneville is modifying these forms to reflect ministerial changes, update notice requirements, and add the service commencement date for purposes of participating in the EIM.

##### 3. Transmission Planning Process (Attachment K)

The Tariff describes the processes Bonneville uses to develop long-range plans for the transmission system, including the process for Bonneville's participation in coordinated regional transmission planning. Bonneville is modifying the transmission planning processes to reflect Bonneville's participation in NorthernGrid, the regional planning organization.

##### 4. Large and Small Generator Interconnections (Attachments L and N)

The Tariff includes standard procedures and form of agreements to interconnect large and small generating facilities to the FCRTS. Bonneville is modifying the procedures and form agreements to reflect minor changes, align with the Commission's Order No. 845 and 845-A requirements, add procedures for repowering and replacing existing generation facilities, and add language related to Bonneville's potential EIM participation.

##### 5. Basic Credit Standards (Section 11 and Attachment M)

Bonneville requires transmission customers to complete credit review procedures in accordance with Bonneville's basic credit standards. Bonneville's basic credit standards are available on Bonneville's website. Bonneville is modifying the Tariff to incorporate the basic credit standards. Bonneville is not proposing substantive changes to the basic credit standards.



## 6. Real Power Loss Return (Schedule 11)

Bonneville requires transmission customers to replace real power losses associated with transmission service. Real power losses are determined using real power loss factors established by Bonneville in Schedule 11. Bonneville is modifying the real power loss return factor for transmission service over the Network segment. The rates applicable to real power losses may be established in the BP–22 proceeding and are outside the scope of the TC–22 tariff proceeding.

## 7. EIM Tariff Terms and Condition Proposals (Sections 1, 7.1, 10.2, 12.4, 13.6, 14.7, 15.7, 16.1, 28.1, 28.5, 28.7, 29.2, 30.1, 30.4, Schedules 4 and 9, and Attachment Q)

Since 2018, Bonneville has been exploring whether to join the Western EIM, which is an extension of the CAISO real-time market. The EIM is operated by the CAISO, which uses market software to economically dispatch participating generation resources to balance supply, transfers between balancing authority areas (interchange), and load across the market's footprint, while also simultaneously ensuring generation and transmission limitations are respected. For balancing authorities in the EIM (EIM Entities), the EIM replaces Energy Imbalance and Generator Imbalance under the EIM Entities' respective open access transmission tariffs. In September of 2019, following an extensive public process, Bonneville issued the Energy Imbalance Market Policy Administrator's Record of Decision, in which the Administrator made a number of policy decisions related to Bonneville's potential participation in the EIM and signed an EIM Implementation Agreement—a first step to joining the EIM. In that ROD, Bonneville explained its intent to continue through the EIM evaluation process, with the expectation that a final decision on EIM participation would be made in 2021. If Bonneville decides to join the EIM, actual participation is projected to begin in 2022. To position BPA to join the EIM in 2022, Bonneville must establish the Tariff terms and conditions and rates for participating in the EIM. Thus, a major portion of the TC–22 tariff proceeding will be dedicated to developing the Tariff terms and conditions language necessary to facilitate Bonneville's participation in the EIM in 2022. The rates for participating in the EIM are being established in the BP–22 proceeding (rates are outside the scope of the TC–22 tariff proceeding).

**Part V—Proposed Tariff**

Bonneville's proposed Tariff is part of this notice and is available to view and download on Bonneville's website at [www.bpa.gov/goto/TC22](http://www.bpa.gov/goto/TC22).

**Signing Authority**

This document of the Department of Energy was signed on November 19, 2020, by John L. Hairston, Acting Administrator and Chief Executive Officer of the Bonneville Power Administration, 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 November 19, 2020.

**Treena V. Garrett,**

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

[FR Doc. 2020–26015 Filed 11–30–20; 8:45 am]

**BILLING CODE 6450–01–P**

**DEPARTMENT OF ENERGY**

**[FE Docket No. 19–34–LNG]**

**Annova LNG Common Infrastructure, LLC; Application To Amend Export Term Through December 31, 2050, for Existing Non-Free Trade Agreement Authorization**

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed on November 24, 2020, by Annova LNG Common Infrastructure, LLC (Annova LNG). Annova LNG seeks to amend the export term set forth in its current authorization to export liquefied natural gas (LNG) to non-free trade agreement countries, DOE/FE Order No. 4491, to a term ending on December 31, 2050. Annova LNG filed the Application under the Natural Gas Act (NGA) and DOE's policy statement entitled, "Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year

2050" (Policy Statement). Protests, motions to intervene, notices of intervention, and written comments on the requested term extension are invited.

**DATES:** Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, December 16, 2020.

**ADDRESSES:**

*Electronic Filing by email:* [fergas@hq.doe.gov](mailto:fergas@hq.doe.gov).

*Regular Mail:* U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

*Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.):* U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:**

Benjamin Nussdorf or Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–7893; (202) 586–2627, [benjamin.nussdorf@hq.doe.gov](mailto:benjamin.nussdorf@hq.doe.gov) or [amy.sweeney@hq.doe.gov](mailto:amy.sweeney@hq.doe.gov).

Cassandra Bernstein or Edward Toyozaki, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793; (202) 586–0126, [cassandra.bernstein@hq.doe.gov](mailto:cassandra.bernstein@hq.doe.gov) or [edward.toyozaki@hq.doe.gov](mailto:edward.toyozaki@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** On February 10, 2020, in Order No. 4491, DOE/FE authorized Annova LNG to export domestically produced LNG in a volume equivalent to 360 billion cubic feet per year of natural gas, pursuant to NGA section 3(a), 15 U.S.C. 717b(a).<sup>1</sup> Annova LNG is authorized to export this LNG from the proposed Annova LNG Brownsville Project, to be located on the Brownsville Ship Channel in Cameron County, Texas, to any country with which the United States has not entered

<sup>1</sup> *Annova LNG Common Infrastructure, LLC*, DOE/FE Order No. 4491, FE Docket No. 19–34–LNG, Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations (Feb. 10, 2020).



into a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries) for a 20-year term. In the Application,<sup>2</sup> Annova LNG asks DOE to extend its current export term to a term ending on December 31, 2050, as provided in the Policy Statement.<sup>3</sup> Additional details can be found in the Application, posted on the DOE/FE website at: <https://www.energy.gov/sites/prod/files/2020/11/f81/Annova%202050%20Application.pdf>.

### DOE/FE Evaluation

In the Policy Statement, DOE adopted a term through December 31, 2050 (inclusive of any make-up period), as the standard export term for long-term non-FTA authorizations.<sup>4</sup> As the basis for its decision, DOE considered its obligations under NGA section 3(a), the public comments supporting and opposing the proposed Policy Statement, and a wide range of information bearing on the public interest.<sup>5</sup> DOE explained that, upon receipt of an application under the Policy Statement, it would conduct a public interest analysis of the application under NGA section 3(a). DOE further stated that “the public interest analysis will be limited to the application for the term extension—meaning an intervenor or protestor may challenge the requested extension but not the existing non-FTA order.”<sup>6</sup>

Accordingly, in reviewing Annova LNG's Application, DOE/FE will consider any issues required by law or policy under NGA section 3(a), as informed by the Policy Statement. To the extent appropriate, DOE will consider the study entitled, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study),<sup>7</sup> DOE's response to public comments received

on that Study,<sup>8</sup> and the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States*, 79 FR 48132 (Aug. 15, 2014);<sup>9</sup>
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States*, 79 FR 32260 (June 4, 2014);<sup>10</sup> and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update*, 84 FR 49278 (Sept. 19, 2019), and DOE/FE's response to public comments received on that study.<sup>11</sup>

Parties that may oppose the Application should address these issues and documents in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

### Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable, addressing the Application. Interested parties will be provided 15 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention. The public previously was given an opportunity to intervene in, protest, and comment on Annova LNG's long-term non-FTA application. Therefore, DOE will not consider comments or protests that do not bear directly on the requested term extension.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve

to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to [fergas@hq.doe.gov](mailto:fergas@hq.doe.gov), with FE Docket No. 19–34–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 19–34–LNG. *Please Note:* If submitting a filing via email, please include all related documents and attachments (e.g., exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Office of Regulation, Analysis, and Engagement docket room, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE web address: <https://www.energy.gov/fe/services/natural-gas-regulation>.

<sup>2</sup> Annova LNG Common Infrastructure, LLC, Application to Amend Export Term for Existing Long-Term Authorization Through December 31, 2050, FE Docket No. 19–34–LNG (Nov. 24, 2020).

<sup>3</sup> U.S. Dep't of Energy, Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050; Notice of Final Policy Statement and Response to Comments, 85 FR 52237 (Aug. 25, 2020) [hereinafter Policy Statement].

<sup>4</sup> See *id.*, 85 FR 52247.

<sup>5</sup> See *id.*, 85 FR 52247.

<sup>6</sup> *Id.*, 85 FR 52247.

<sup>7</sup> See NERA Economic Consulting, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (June 7, 2018), available at: <https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf>.

<sup>8</sup> U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study; Notice of Response to Comments, 83 FR 67251 (Dec. 28, 2018).

<sup>9</sup> The Addendum and related documents are available at: <http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states>.

<sup>10</sup> The 2014 Life Cycle Greenhouse Gas Report is available at: <http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states>.

<sup>11</sup> U.S. Dep't of Energy, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update—Response to Comments, 85 FR 72 (Jan. 2, 2020). The 2019 Update and related documents are available at: <https://fossil.energy.gov/app/docketindex/docket/index/21>.

Signed in Washington, DC, on November 25, 2020.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Fossil Energy.

[FR Doc. 2020-26490 Filed 11-30-20; 8:45 am]

BILLING CODE 6450-01-P

## DEPARTMENT OF ENERGY

### Notice of Guidance for Potential Applicants Involving Critical Minerals and Related Activity

**AGENCY:** Loan Programs Office, Department of Energy.

**ACTION:** Notice of guidance for potential applicants involving critical minerals and related activity.

**SUMMARY:** The U.S. Department of Energy ("DOE") hereby provides notice of guidance for applicants to the Loan Programs Office under Title XVII of the Energy Policy Act of 2005 (Title XVII) and the Energy Independence and Security Act of 2007 (ATVM statute). The guidance describes the types of applicants and projects that may be considered by the Loan Programs Office under Title XVII and the ATVM statute.

**DATES:** DOE will accept applications regarding the foregoing from December 1, 2020 through February 1, 2021. For further information, please visit: <https://www.energy.gov/lpo/application-process>.

**ADDRESSES:** Interested parties are to submit applications electronically through the following link: <https://www.energy.gov/lpo/application-process>. Additional guidance and information may be found at: <https://www.energy.gov/lpo/loan-programs-office>.

#### FOR FURTHER INFORMATION CONTACT:

Questions may be addressed to: John Lushetsky, Senior Advisor, Loan Programs Office, (202) 586-2678, U.S. Department of Energy LP 10, 1000 Independence Avenue SW, Washington DC, 20585, or by email to: [john.lushetsky@hq.doe.gov](mailto:john.lushetsky@hq.doe.gov). Electronic communications are recommended for correspondence and required for submission of application information.

**SUPPLEMENTARY INFORMATION:** Executive Order 13953 ("Executive Order Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries," dated September 30, 2020, establishes policy pertaining to lending activities by the U.S. Department of Energy Loan Programs Office ("LPO") pursuant to Title XVII of the Energy Policy Act of 2005, as amended (42 U.S.C. 16511, et

seq.) ("Title XVII"), and Section 136 of the Energy Independence and Security Act of 2007, as amended (42 U.S.C. 17013) (the "ATVM Statute"), as they apply to "Critical Minerals," "Critical Minerals Production," and related activities, including activities related to minerals more broadly. See: <https://www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-domestic-supply-chain-reliance-critical-minerals-foreign-adversaries>. "Critical Minerals" and "Critical Minerals Production," involving thirty-five identified Critical Minerals, are further defined by Section 2(b) of Executive Order 13817 ("A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals," dated December 20, 2017). See: <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-federal-strategy-ensure-secure-reliable-supplies-critical-minerals>.

### Preference for Minerals, Including Critical Minerals

Pursuant to Executive Order 13953 and Executive Order 13817, it is the policy of LPO to consider all eligible projects under Title XVII and the ATVM Statute in the context of Critical Minerals and the production of Critical Minerals and other minerals. Consistent with the policies expressed in Executive Order 13953 and 13817, it is also the policy of LPO to interpret the Title XVII Program and the ATVM Program broadly to encourage applications from potential projects involving the production, manufacture, recycling, processing, recovery, or reuse of Critical Minerals and other minerals. LPO will evaluate all applications on a case-by-case basis.

### Title XVII Projects

Under Title XVII, DOE may, consistent with applicable law, issue loan guarantees in support of projects ("Title XVII Eligible Projects") that: (a) Avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; (b) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued; (c) attain specified emission requirements (see 42 U.S.C. 16513(d)); and (d) fall within the following categories (see 42 U.S.C. 16513(b) and (c)):

1. Renewable energy systems.
2. Advanced fossil energy technology (including coal gasification that attains specified emission requirements) (see 42 U.S.C. 16513(d)).

3. Hydrogen fuel cell technology for residential, industrial, or transportation applications.

4. Advanced nuclear energy facilities.

5. Carbon capture and sequestration practices and technologies, including agricultural and forestry practices that store and sequester carbon.

6. Efficient electrical generation, transmission, and distribution technologies.

7. Efficient end-use energy technologies.

8. Production facilities for the manufacture of fuel-efficient vehicles or parts of those vehicles, including electric drive vehicles and advanced diesel vehicles.

9. Pollution control equipment.

10. Refineries, meaning facilities at which crude oil and other substances are refined into gasoline and other products.

11. Certain gasification projects specified in 42 U.S.C. 16513(c).

### Examples of Potential Minerals Projects Under Title XVII

Minerals or Minerals Production projects that may qualify for support under Title XVII include, without limitation, the following:

1. Mining, processing, or milling of Critical Minerals utilizing efficient end-use energy technologies (Efficient end-use energy technologies);

2. Processing or refining of uranium for nuclear fuel (Advanced nuclear energy facilities);

3. Processing of zirconium for cladding of uranium fuel elements (Advanced nuclear energy facilities);

4. Processing of antimony for use as a neutron source in nuclear reactors during reactor startup (Advanced nuclear energy facilities);

5. Renewable energy projects that produce Critical Minerals as by-products of, or adjuncts to, power generation activities, including geothermal projects that produce lithium or other Critical Minerals (Renewable energy systems);

6. Advanced fossil energy projects that produce or extract Critical Minerals, including rare earth elements, from power plant byproducts (including fly ash and coal refuse) (Advanced fossil energy projects); and

7. Other Critical Minerals projects that meet the criteria of Title XVII.

Each applicant for a loan guarantee will be required to demonstrate that the proposed project satisfies the statutory requirements necessary for the proposed project to constitute a Title XVII Eligible Project.

## ATVM Projects

Under the ATVM Statute, loans may, under applicable law, be made to borrowers for projects (“ATVM Eligible Projects”) that are: (a) Financially viable without the receipt of additional Federal funding associated with the proposed project; and (b) automobile manufacturers, ultra-efficient vehicle manufacturers, or component suppliers to pay the costs of: (1) Reequipping, expanding, or establishing a manufacturing facility in the United States to produce qualifying advanced technology vehicles (“ATVs”) or “qualifying components” for ATVs; and (2) engineering integration performed in the United States of ATVs and qualifying components.

Under the applicable provisions of the ATVM statute, DOE must limit its relevant support to “manufacturing facilities” producing ATVs and “qualifying components”—which are defined as products or equipment designed for, and installed in, ATVs for the purpose of meeting ATV performance requirements.

## Examples of Potential Minerals Projects Under the ATVM Statute

Minerals or Minerals Production projects that may qualify for support under the ATVM Statute include, without limitation, the following:

1. Processing of Critical Minerals, including lithium, nickel, manganese, graphite, or cobalt, for use in electric vehicle battery systems for ATVs;
2. Processing or refining of aluminum, chromium, manganese, vanadium, or tin used for the light-weighting of ATVs;
3. Processing or refining of platinum group metals (“PGMs”), and the PGM catalysts from which they are derived, for use in hydrogen fuel cells and fuel cell electric vehicles that are ATVs; and
4. Processing of Critical Minerals (to include neodymium, praseodymium, dysprosium, and terbium), for use in permanent magnets and permanent magnet electric motors for application in electric drive motors for qualifying ATVs; and
5. Other Critical Minerals projects that meet the criteria of the ATVM statute.

## Early Discussion With LPO Regarding Potential Projects Is Encouraged

It is the preference of LPO to become involved with potential applicants as early as possible in the development of Title XVII and ATVM Eligible Projects. Therefore, potential applicants are encouraged to contact LPO before making a formal application, and as early as possible in the development of a potential project. The foregoing does

not change or modify that current application process. LPO will respond in writing to any inquiry from the applicant regarding the status of an application within ten (10) business days after the date of such inquiry.

Potential applicants may inquire with LPO about opportunities for emerging areas involving Critical Minerals and other minerals by contacting LPO. For further information on the application process for either program, please see: <https://www.energy.gov/lpo/loan-programs-office>.

## Preference for American Made Products

A preference will be given to those projects with a plan to utilize American made products and employ American workers.

## Early Engagement With LPO

Potential applicants may inquire with LPO about opportunities for emerging areas involving Critical Minerals and other minerals by contacting LPO. For further information on the application process for either program, please see: <https://www.energy.gov/lpo/loan-programs-office>.

## Disclaimer Regarding Agency Guidance

In accordance with Executive Order 13891 (“Promoting the Rule of Law Through Improved Agency Guidance Documents,” dated October 9, 2019), the information contained in this guidance:

- (i) Does not have the force and effect of law and is not meant to bind the public in any way;
- (ii) is intended only to provide clarity to the public regarding existing requirements under the law or agency policies, except as authorized by law or as incorporated into a contract; and
- (iii) will not be relied on by DOE as an independent basis for an enforcement action or other administrative penalty. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

## Signing Authority

This document of the Department of Energy was signed on November 24, 2020, by Dong Kim, Executive Director, Loan Programs Office, 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 November 24, 2020.

**Treena V. Garrett,**

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

[FR Doc. 2020–26407 Filed 11–30–20; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP21–170–001.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* Tariff Amendment: TETLP ASA DEC 2020 Amendment Filing to be effective 12/1/2020.

*Filed Date:* 11/20/20.

*Accession Number:* 20201120–5000.

*Comments Due:* 5 p.m. ET 12/2/20.

*Docket Numbers:* RP21–234–000.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* § 4(d) Rate Filing: TETLP 2020 ASA Settlement—Compliance Filing to be effective 12/1/2020.

*Filed Date:* 11/20/20.

*Accession Number:* 20201120–5018.

*Comments Due:* 5 p.m. ET 12/2/20.

*Docket Numbers:* RP21–236–000.

*Applicants:* Equitrans, L.P.

*Description:* § 4(d) Rate Filing:

Expired Negotiated Rate Agreement—Eclipse Resources Marketing LP to be effective 12/21/2020.

*Filed Date:* 11/20/20.

*Accession Number:* 20201120–5041.

*Comments Due:* 5 p.m. ET 12/2/20.

*Docket Numbers:* RP21–237–000.

*Applicants:* Tennessee Gas Pipeline Company, L.L.C.

*Description:* Compliance filing

Cashout Report 2019–2020.

*Filed Date:* 11/20/20.

*Accession Number:* 20201120–5055.

*Comments Due:* 5 p.m. ET 12/2/20.

*Docket Numbers:* RP21–238–000.

*Applicants:* Columbia Gas

Transmission, LLC.

*Description:* § 4(d) Rate Filing: SWN Negot. Rate & Non-Conforming Agmt. to be effective 12/1/2020.

*Filed Date:* 11/20/20.  
*Accession Number:* 20201120–5109.  
*Comments Due:* 5 p.m. ET 12/2/20.  
*Docket Numbers:* RP21–239–000.  
*Applicants:* UGI Mt. Bethel Pipeline Company, LLC.  
*Description:* Annual Report on Operational Sales and Purchases of UGI Mt. Bethel Pipeline, LLC under RP21–239.

*Filed Date:* 11/20/20.  
*Accession Number:* 20201120–5130.  
*Comments Due:* 5 p.m. ET 12/2/20.  
*Docket Numbers:* RP21–240–000.  
*Applicants:* UGI Sunbury, LLC.  
*Description:* Operational Purchases and Sales Report of UGI Sunbury, LLC under RP21–240.

*Filed Date:* 11/20/20.  
*Accession Number:* 20201120–5181.  
*Comments Due:* 5 p.m. ET 12/2/20.  
*Docket Numbers:* RP21–241–000.  
*Applicants:* Southern Star Central Gas Pipeline, Inc.

*Description:* Compliance filing Annual Cash-Out Activity Report 2020.  
*Filed Date:* 11/20/20.

*Accession Number:* 20201120–5205.  
*Comments Due:* 5 p.m. ET 12/2/20.  
*Docket Numbers:* RP21–231–001.  
*Applicants:* El Paso Natural Gas Company, L.L.C.

*Description:* Tariff Amendment: Amendment to Negotiated Rate Agreement Update (Pioneer) to be effective 1/1/2021.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5100.  
*Comments Due:* 5 p.m. ET 12/7/20.

*Docket Numbers:* RP21–242–000.  
*Applicants:* Wyoming Interstate Company, L.L.C.

*Description:* § 4(d) Rate Filing: Non-Conforming Agreements Filing (Citadel/Mieco/Spotlight/Tenaska/Williams) to be effective 1/1/2021.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5033.  
*Comments Due:* 5 p.m. ET 12/7/20.

*Docket Numbers:* RP21–243–000.  
*Applicants:* National Fuel Gas Supply Corporation.

*Description:* Compliance filing TSCA—Informational Filing (November 2020).

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5082.  
*Comments Due:* 5 p.m. ET 12/7/20.

*Docket Numbers:* RP21–245–000.  
*Applicants:* Gas Transmission Northwest LLC.

*Description:* Annual Fuel Charge Adjustment of Gas Transmission Northwest LLC under RP21–245.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5199.  
*Comments Due:* 5 p.m. ET 12/7/20.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.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: November 24, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–26444 Filed 11–30–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

### Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding,

to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's website at <http://www.ferc.gov> using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at (866) 208–3676, or for TTY, contact (202)502–8659.

| Docket No.           | File date  | Presenter or requester   |
|----------------------|------------|--------------------------|
| <b>Prohibited</b>    |            |                          |
| NONE                 |            |                          |
| <b>Exempt</b>        |            |                          |
| 1. P–10853–022 ..... | 11–12–2020 | FERC Staff. <sup>1</sup> |
| 2. CP20–50–000 ..... | 11–16–2020 | FERC Staff. <sup>2</sup> |

| Docket No.                                      | File date  | Presenter or requester                             |
|-------------------------------------------------|------------|----------------------------------------------------|
| 3. P-10853-022 .....                            | 11-19-2020 | FERC Staff. <sup>3</sup>                           |
| 4. CP16-9-000 .....                             | 11-19-2020 | U.S. Senate. <sup>4</sup>                          |
| 5. CP15-558-000, CP19-78-000, CP20-47-000 ..... | 11-19-2020 | New Jersey Department of Environmental Protection. |

<sup>1</sup> Memo dated 11/10/20 forwarding U.S. Fish and Wildlife Service's updated list of threatened, endangered, candidate, and proposed species.

<sup>2</sup> Memo dated 11/10/2020 forwarding the National Marine Fisheries Service's comments.

<sup>3</sup> Memo dated 11/18/20 regarding the conference call with representatives from Otter Tail Power Company and the Kleinschmidt Group.

<sup>4</sup> U.S. Senators Edward J. Markey and Elizabeth Warren.

Dated: November 24, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020-26447 Filed 11-30-20; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP21-2-000]

#### **Southern Star Central Gas Pipeline, Inc.; Notice of Schedule for the Preparation of an Environmental Assessment for the Lines DT and DS Replacement Project Amendment**

On October 2, 2020, Southern Star Central Gas Pipeline, Inc. (Southern Star) filed an application in Docket No. CP21-2-000 requesting an amendment to the Federal Energy Regulatory Commission's (Commission or FERC) authorization pursuant to Section 7(b) of the Natural Gas Act issued on December 19, 2019, in Docket No. CP19-31-000. The proposed project is known as the Lines DT and DS Replacement Project Amendment (Project). The purpose of this Project is to modify the previous authorization (CP19-31-000) to grant Southern Star's proposed abandonment of certain natural gas pipeline facilities in-place rather than by removal, as previously proposed.

On October 7, 2020, the Commission issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Project.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Project and the planned schedule for the completion of the environmental review.<sup>1</sup>

#### **Schedule for Environmental Review** *Issuance of EA: December 28, 2020* *90-day Federal Authorization Decision* *Deadline: March 28, 2021*

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

#### **Project Description**

The Project would involve the abandonment in-place of the 31.8-mile-long, 26-inch-diameter Line DT and the 31.4-mile-long, 20-inch-diameter Line DS, rather than abandonment by removal, which was authorized in Docket No. CP19-31-000. The Project is located in Anderson and Franklin Counties, Kansas.

#### **Background**

On October 27, 2020, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Lines DT and DS Replacement Project Amendment and Notice of Public Scoping Session*. The Notice of Scoping was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the Notice of Scoping, the Commission received a comment from a landowner who requested that Southern Star abandon the pipeline by removal on his land, as originally proposed. All substantive comments will be addressed in the EA.

#### **Additional Information**

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to <https://www.ferc.gov/ferc-online/overview> to register for eSubscription.

Additional information about the Project is available from the

Commission's Office of External Affairs at (866) 208-FERC or on the FERC website ([www.ferc.gov](http://www.ferc.gov)). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.*, CP21-2-000), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208-3676, TTY (202) 502-8659, or at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov). The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: November 24, 2020.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2020-26454 Filed 11-30-20; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### **Combined Notice of Filings #1**

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC21-25-000.

*Applicants:* Iberdrola, S.A., Avangrid, Inc., Avangrid Networks, Inc., PNM Resources, Inc., Public Service Company of New Mexico, NMRD Data Center II, LLC, NMRD Data Center III, LLC, New Mexico PPA Corporation.

*Description:* Application for Authorization Under Section 203 of the Federal Power Act, et al. of Iberdrola, S.A., et al.

*Filed Date:* 11/23/20.

*Accession Number:* 20201123-5188.

*Comments Due:* 5 p.m. ET 1/22/21.

Take notice that the Commission received the following exempt wholesale generator filings:

*Docket Numbers:* EG21-39-000.

*Applicants:* Haystack Wind Project, LLC.

*Description:* Notice of Self-Certification of Exempt Wholesale Generator Status of Haystack Wind Project, LLC.

<sup>1</sup> 40 CFR 1501.10 (2020).

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5139.  
*Comments Due:* 5 p.m. ET 12/14/20.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–3028–006.  
*Applicants:* Elk Hills Power, LLC.  
*Description:* Notice of Non-Material Change in Status of Elk Hills Power, LLC.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5192.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER17–996–005.  
*Applicants:* New York Independent System Operator, Inc.

*Description:* Compliance filing: Compliance re: Remove state program text from Offer Floor calculations of SCRs to be effective 10/7/2020.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5080.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER19–1492–002.  
*Applicants:* Wisconsin Electric Power Company.

*Description:* Compliance filing: Settlement Compliance Filing—PIPP Retirement to be effective 5/29/2019.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5107.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER20–1719–002.  
*Applicants:* PPL Electric Utilities Corporation, PJM Interconnection, L.L.C.

*Description:* Compliance filing: PPL Electric submits Deficiency Response to Compliance in ER20–1719 re Order 864 to be effective N/A.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5038.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER20–1877–002.  
*Applicants:* PJM Interconnection, L.L.C.

*Description:* Tariff Amendment: Suppl. & Amendment: Rev. ISA, SA#3601 & ICSA, SA#5630; Queue No. V3–028/AB2–170 to be effective 4/22/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5036.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–460–000.  
*Applicants:* PJM Interconnection, L.L.C.

*Description:* Compliance filing: Compliance in Docket No. EL20–56 to be effective 11/23/2020.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5102.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER21–461–000.  
*Applicants:* El Paso Electric Company.  
*Description:* § 205(d) Rate Filing: Service Agreement No. 346, EPE-La

Mesa PV I LLC SGIA to be effective 11/23/2020.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5112.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER21–462–000.  
*Applicants:* PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Original ISA, Service Agreement No. 5846; Queue No. AB2–133 to be effective 10/22/2020.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5117.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER21–463–000.  
*Applicants:* Old Dominion Electric Cooperative, Inc.

*Description:* Request for Limited Waiver of Old Dominion Electric Cooperative.

*Filed Date:* 11/23/20.  
*Accession Number:* 20201123–5190.  
*Comments Due:* 5 p.m. ET 12/14/20.

*Docket Numbers:* ER21–464–000.  
*Applicants:* New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.

*Description:* § 205(d) Rate Filing: SGIA (SA 2571) among NYISO, National Grid and Martin Rd Solar to be effective 11/16/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5023.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–465–000.  
*Applicants:* New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.

*Description:* § 205(d) Rate Filing: SGIA (SA 2572) among NYISO, National Grid, and Bakerstand Solar, LLC to be effective 11/16/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5026.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–466–000.  
*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 2415R13 Kansas Municipal Energy Agency NITSA and NOA to be effective 9/1/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5030.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–467–000.  
*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 2562R8 Kansas Municipal Energy Agency NITSA and NOA to be effective 9/1/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5034.  
*Comments Due:* 5 p.m. ET 12/15/20.  
*Docket Numbers:* ER21–468–000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2020–11–24\_SA 3375 Entergy Arkansas-Searcy Solar 1st Rev GIA (J893 S1000) to be effective 11/12/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5035.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–469–000.  
*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 2900R14 KMEA NITSA NOA to be effective 9/1/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5039.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–470–000.  
*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 3675R1 Doniphan Electric Cooperative Assn, Inc. NITSA NOA to be effective 9/1/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5041.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–471–000.  
*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2020–11–24\_SA 3576 MDU-Emmons Logan Wind FSA (J302 J503) to be effective 1/24/2021.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5047.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–472–000.  
*Applicants:* PacifiCorp.  
*Description:* § 205(d) Rate Filing: Tri-State, Empire Const Agmt at Pinto to be effective 1/24/2021.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5089.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–473–000.  
*Applicants:* PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Original ISA No. 5849; Queue No. AE2–131 to be effective 10/28/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5091.  
*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–474–000.  
*Applicants:* New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.

*Description:* § 205(d) Rate Filing: SGIA Among the NYISO, National Grid, and Sky High Solar to be effective 11/16/2020.

*Filed Date:* 11/24/20.  
*Accession Number:* 20201124–5097.  
*Comments Due:* 5 p.m. ET 12/15/20.  
*Docket Numbers:* ER21–475–000.

*Applicants:* PacifiCorp.

*Description:* § 205(d) Rate Filing: Tri-State, Empire Interconnect Agmt at Pinto to be effective 1/24/2021.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5099.

*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–476–000.

*Applicants:* Georgia Power Company.

*Description:* § 205(d) Rate Filing:

GPCo 2020 PBOP Filing to be effective 1/1/2020.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5104.

*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–477–000.

*Applicants:* Mississippi Power Company.

*Description:* § 205(d) Rate Filing: PBOP 2020 Filing to be effective 1/1/2020.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5105.

*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–478–000.

*Applicants:* Southern Electric Generating Company.

*Description:* § 205(d) Rate Filing: SEGCo 2020 PBOP Filing to be effective 1/1/2020.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5107.

*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–479–000.

*Applicants:* Alabama Power Company.

*Description:* Initial rate filing: Nassau Solar Affected System Upgrade Agreement Filing to be effective 10/27/2020.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5126.

*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–480–000.

*Applicants:* Georgia Power Company.

*Description:* Initial rate filing: Nassau Solar Affected System Upgrade Agreement Filing to be effective 10/27/2020.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5127.

*Comments Due:* 5 p.m. ET 12/15/20.

*Docket Numbers:* ER21–481–000.

*Applicants:* Mississippi Power Company.

*Description:* Initial rate filing: Nassau Solar Affected System Upgrade Agreement Filing to be effective 10/27/2020.

*Filed Date:* 11/24/20.

*Accession Number:* 20201124–5130.

*Comments Due:* 5 p.m. ET 12/15/20.

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: November 24, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–26445 Filed 11–30–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 3409–032]

#### Boyne USA, Inc.; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 3409–032.

c. *Date filed:* January 31, 2020.

d. *Applicant:* Boyne USA, Inc. (Boyne USA).

e. *Name of Project:* Boyne River Hydroelectric Project.

f. *Location:* On the Boyne River in Boyne Valley Township, Charlevoix County, Michigan. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Tyler Prange, Area Manager, 1 Boyne Mountain Rd., Boyne Falls, MI 49713; (231) 549–6076; [tyler.prange@boynemountain.com](mailto:tyler.prange@boynemountain.com).

i. *FERC Contact:* Patrick Ely at [patrick.ely@ferc.gov](mailto:patrick.ely@ferc.gov) or (202) 502–8570.

j. *Deadline for filing comments, recommendations, terms and*

*conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FEROnlineSupport@ferc.gov](mailto:FEROnlineSupport@ferc.gov), (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper request. 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, Maryland 20852. The first page of any filing should include docket number P–3409–032.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on July 15, 2020, revising the regulations under 40 CFR parts 1500–1518 that federal agencies use to implement NEPA (see Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304). The Final Rule became effective on and applies to any NEPA process begun after September 14, 2020. An agency may also apply the regulations to ongoing activities and environmental documents begun before September 14, 2020, which includes the proposed Boyne River Project. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. *The Boyne River Project consists of the following facilities:* (1) An existing 610-foot-long by 30-foot-high (left) earth-fill dam embankment and a 180-



foot-long by 18-foot-high (right) earth-fill dam embankment; (2) a 132-foot-long by 50 to 72-foot-wide by 12-foot-deep concrete lined headrace channel; (3) a 35-foot-long concrete fixed crest spillway that discharges to a transverse collection gallery, and a 77-foot-long by 5-foot-diameter concrete discharge pipe that carries flow from the collection gallery to a stilling basin; (4) a 20-foot-long by 8.3-foot-wide to 16-foot-wide by 4-foot-deep stilling basin; (5) 6-foot wide by 7-foot 9-inches high sluice gate spillway; (6) a 72-foot-long by 5-foot-diameter concrete pipe that carries the flow from the sluice gate spillway to the stilling basin; (7) a 74-foot-long steel penstock consisting of two 5-foot-diameter and one 7-foot-diameter sections; (8) a 75-foot-long by 18-inch-diameter steel pipes that make up the auxiliary spillway; (9) a 715-foot long by 100-foot-wide emergency overflow spillway area; and (10) a 24-foot-long by 24-foot-wide concrete powerhouse with a single 250-kilowatt propeller turbine. The project also consists of a 100-foot-long, 2400-volt underground transmission line connected to a pole-mounted transformer and a 2.34-mile-long, 7.2/12.5-kilovolt overhead transmission line from the pole-mounted transformer to the Boyne Mountain Resort side of the Consumers Energy utility primary metering cabinet. The last 1,300 feet +/- at the Boyne Mountain Resort end is also buried.

m. A copy of the application can be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to

which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. *The license applicant must file no later than 60 days following the date of issuance of this notice:* (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification. Please note that the certification request must be sent to the certifying authority and to the Commission concurrently.

p. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

| Milestone                                                                                                                   | Target date   |
|-----------------------------------------------------------------------------------------------------------------------------|---------------|
| Deadline for Filing Protest, Motion to Intervene, Comments, Recommendations, and Agency Terms and Conditions/Prescriptions. | January 2021. |
| Deadline for Filing Reply Comments.                                                                                         | March 2021.   |

Dated: November 24, 2020.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2020-26448 Filed 11-30-20; 8:45 am]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OECA-2013-0333; FRL-10017-61-OMS]

### Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Air Emission Standards for Tanks, Surface Impoundment and Containers (Renewal)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Air Emission Standards for Tanks, Surface Impoundment and Containers (EPA ICR Number 1593.11, OMB Control Number 2060-0318), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through January 31, 2021. Public comments were previously requested, via the **Federal Register** on May 12, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**DATES:** Additional comments may be submitted on or before December 31, 2020.

**ADDRESSES:** Submit your comments to EPA, referencing Docket ID No. EPA-HQ-OECA-2013-0333, online using [www.regulations.gov](http://www.regulations.gov) (our preferred method), by email to [docket.oeca@epa.gov](mailto:docket.oeca@epa.gov), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

**FOR FURTHER INFORMATION CONTACT:**

Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564-2970; fax number: (202) 564-0050; email address: [yellin.patrick@epa.gov](mailto:yellin.patrick@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at [www.regulations.gov](http://www.regulations.gov), or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit: <http://www.epa.gov/dockets>.

**Abstract:** Owners and operators of affected facilities are required to comply with reporting and record keeping requirements for the General Provisions (40 CFR part 264, subpart A and 40 CFR 265, Subpart A), as well as for the specific requirements at 40 CFR part 264, Subpart CC and 40 CFR part 265, Subpart CC. This includes submitting initial notifications, performance tests and periodic reports and results, and maintaining records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are used by EPA to determine compliance with these standards.

**Form Numbers:** None.

**Respondents/affected entities:** Facilities that treat, store, or dispose of hazardous wastes in tanks, surface impoundments, and containers.

**Respondent's obligation to respond:** Mandatory (40 CFR part 264, subpart CC and 40 CFR part 265, subpart CC).

**Estimated number of respondents:** 6,760 (total).

**Frequency of response:** Occasionally and semiannually.

**Total estimated burden:** 775,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

**Total estimated cost:** \$105,000,000 (per year), which includes \$13,500,000 in annualized capital and/or operation & maintenance costs.

**Changes in the Estimates:** There is an adjustment increase in the total estimated burden as currently identified

in the OMB Inventory of Approved Burdens. This increase is not due to any program changes; the regulations have not changed over the past three years and are not anticipated to change over the next three years. The Agency estimate of the number of respondents has increased and there is an attendant increase in the cost of monitoring, recordkeeping, and reporting. The increase in the estimated number of respondents is due to a re-examination of the Agency's ECHO database of sources subject to hazardous waste and Resource Conservation and Recovery Act requirements.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2020-26476 Filed 11-30-20; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2020-0569; FRL-10016-85-OGC]

### Proposed Consent Decree, Clean Air Act Citizen Suit

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed consent decree; request for public comment.

**SUMMARY:** In accordance with the Clean Air Act, as amended (CAA or the Act), notice is given of a proposed consent decree in *Sierra Club v. Wheeler*, No. 2:20-cv-00725-SMB (D. AZ). On April 14, 2020, the Sierra Club filed a complaint in the United States District Court for the District of Arizona, alleging that the Environmental Protection Agency (EPA) failed to perform certain non-discretionary duties. Plaintiff alleges that EPA failed to take final action to approve, disapprove, conditionally approve, or approve in part and disapprove in part, Arizona's nonattainment plan SIP submission for the West Pinal nonattainment area for the PM<sub>10</sub> National Ambient Air Quality Standards (NAAQS). The proposed consent decree would establish a deadline for EPA to take action on the remaining portions of the SIP submission.

**DATES:** Written comments on the proposed consent decree must be received by December 31, 2020.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OGC-2020-0569, online at <https://www.regulations.gov> (EPA's preferred method). Follow the online instructions for submitting comments.

**Instructions:** All submissions received must include the Docket ID number for this action. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Additional Information about Commenting on the Proposed Consent Decree” heading under the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov>, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

**FOR FURTHER INFORMATION CONTACT:**

Geoffrey L. Wilcox, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564-5601; email address: [wilcox.geoffrey@epa.gov](mailto:wilcox.geoffrey@epa.gov).

**SUPPLEMENTARY INFORMATION:**

### I. Obtaining a Copy of the Proposed Consent Decree

The official public docket for this action (identified by Docket ID No. EPA-HQ-OGC-2020-0569) contains a copy of the proposed consent decree.

The electronic version of the public docket for this action contains a copy of the proposed consent decree, and is available through <https://www.regulations.gov>. You may use <https://www.regulations.gov> to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select “search.”

## II. Additional Information About the Proposed Consent Decree

The proposed consent decree would require the EPA to take action pursuant to CAA section 110(k) on an Arizona state implementation plan (SIP) submission. On May 31, 2012, pursuant to CAA section 107(d), EPA designated a portion of Pinal County in Arizona as nonattainment for the PM<sub>10</sub> NAAQS, effective July 2, 2012. On December 21, 2015, the Arizona Department of Environmental Quality (“ADEQ”) submitted a SIP submission to EPA intended to meet the applicable Moderate nonattainment area plan requirements for the West Pinal nonattainment area. EPA determined that part of the SIP submission was complete on March 21, 2016, and EPA published a final rule approving that part of the SIP submission on May 1, 2017 (82 FR 20267).

The proposed consent decree would require the Administrator, pursuant to CAA sections 110(k)(2)–(4), to take action on the remaining portion of Arizona’s December 21, 2015, nonattainment plan SIP submission that EPA did not previously address in the May 1, 2017, final action.

Under the terms of the proposed consent decree, EPA shall sign a notice or notices of final rulemaking that approve, disapprove, conditionally approve, or approve in part and disapprove in part, the remaining portion of Arizona’s December 21, 2015, nonattainment plan SIP submission for the West Pinal area by July 30, 2021.

For a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed consent decree. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

## III. Additional Information About Commenting on the Proposed Consent Decree

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2020–0569, via <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from this docket. The EPA may publish any comment received to its public docket. Do not submit to EPA’s docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is

restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA’s electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the <https://www.regulations.gov> website to submit comments to EPA electronically is EPA’s preferred method for receiving comments. The electronic public docket system is an “anonymous access” system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked “late.” EPA is not required to consider these late comments.

**Gautam Srinivasan,**  
Associate General Counsel.

[FR Doc. 2020–26471 Filed 11–30–20; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0690, FRL–10017–64–OMS]

### Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; General Hazardous Waste Facility Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), General Hazardous Waste Facility (EPA ICR Number 1571.13, OMB Control Number 2050–0120) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through January 31, 2020. Public comments were previously requested via the **Federal Register** on March 26, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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.

**DATES:** Additional comments may be submitted on or before February 1, 2021.

**ADDRESSES:** Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OLEM–2018–0690, online using [www.regulations.gov](http://www.regulations.gov) (our preferred method), by email to [rcra-docket@epa.gov](mailto:rcra-docket@epa.gov), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA’s policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

**FOR FURTHER INFORMATION CONTACT:**

Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 703-308-5477; fax number: 703-308-8433; email address: [vyas.peggy@epa.gov](mailto:vyas.peggy@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at [www.regulations.gov](http://www.regulations.gov) or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

**Abstract:** Section 3004 of the Resource Conservation and Recovery Act (RCRA), as amended, requires the EPA to develop standards for hazardous waste treatment, storage, and disposal facilities (TSDFs) as may be necessary to protect human health and the environment. Subsections 3004(a)(1), (3), (4), (5), and (6) specify that these standards include, but not be limited to, the following requirements:

- Maintaining records of all hazardous wastes identified or listed under subtitle C that are treated, stored, or disposed of, and the manner in which such wastes were treated, stored, or disposed of;
- Operating methods, techniques, and practices for treatment, storage, or disposal of hazardous waste;
- Location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;
- Contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste; and
- Maintaining or operating such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility as may be necessary or desirable.

The regulations implementing these requirements are codified in 40 CFR parts 264 and 265. The collection of this information enables the EPA to properly determine whether owners/operators or hazardous waste treatment, storage, and disposal facilities meet the requirements of Section 3004(a) of RCRA.

**Form Numbers:** None.

**Respondents/affected entities:**

Business and other for-profit, as well as State, Local, and Tribal governments.

**Respondent's obligation to respond:**

Mandatory (RCRA section 3004).

**Estimated number of respondents:** 1,191.

**Frequency of response:** On occasion.

**Total estimated burden:** 558,042 hours per year. Burden is defined at 5 CFR 1320.03(b).

**Total estimated cost:** \$37,504,209 (per year), which includes \$337,223 annualized capital or operation & maintenance costs.

**Changes in the Estimates:** There is decrease of 25,195 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is not due to a program change, but is due to the Agency's push to have facilities leave interim status and enter permitted status, as well as facilities wishing to close to enter post-closure status. This has led to a dramatic decrease in the number of interim status facilities, as well as increased the number of facilities in post-closure.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2020-26475 Filed 11-30-20; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-10017-92-OA]

### Request for Nominations for a Science Advisory Board Panel

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office requests public nominations of scientific experts to form a Panel to review the BenMAP model, an open-source computer program that calculates estimated air pollution-related deaths and illnesses and their associated economic value. BenMAP is a shorthand title referring to the Environmental Benefits Mapping and Analysis Program. The Panel will review the latest available public release version of the BenMAP software.

**DATES:** Nominations should be submitted by December 29, 2020 per the instructions below.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public wishing further information regarding this notice and request for nominations may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), EPA Science Advisory Board via telephone/voice mail (202) 564-2073, or email at [stallworth.holly@epa.gov](mailto:stallworth.holly@epa.gov). General information concerning the EPA SAB can be found

at the EPA SAB website at <http://www.epa.gov/sab>.

**SUPPLEMENTARY INFORMATION:**

**Background:** The SAB (42 U.S.C. 4365) is a chartered Federal Advisory Committee that provides independent scientific and technical peer review, advice, and recommendations to the EPA Administrator on the technical basis for EPA actions. As a Federal Advisory Committee, the SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. The SAB Staff Office is forming an expert panel, the BenMAP Review Panel under the auspices of the Chartered SAB. The BenMAP Review Panel will provide advice through the chartered SAB. The SAB and the BenMAP Review Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. The BenMAP Review Panel will conduct the review of BenMAP as requested by the EPA's Office of Air and Radiation.

**Technical Contact for EPA's draft report:** For information concerning BenMAP-Community Edition v1.5, please contact Neal Fann by email at [fann.neal@epa.gov](mailto:fann.neal@epa.gov) or phone (919) 541-0209.

**Request for Nominations:** The SAB Staff Office is seeking nominations of nationally and internationally recognized scientists with demonstrated expertise in the following disciplines: Software development (including C#/.Net and SQL databases); Geographic Information Systems and Geostatistics; Demographics; Risk Assessment; Statistics/Biostatistics; Photochemical Air Quality Modeling; Economics/Non-Market Valuation. The Panel will be asked to examine the C# code in BenMAP and independently validate results so panelists will need the appropriate software experience and general risk assessment experience to conduct this review. Questions regarding this advisory activity should be directed to the DFO, Dr. Holly Stallworth, listed under **FOR FURTHER INFORMATION CONTACT**.

**Process and Deadline for Submitting Nominations:** Any interested person or organization may nominate qualified individuals in the areas of expertise described above for possible service on the SAB Panel identified in this notice. Individuals may self-nominate. Nominations should be submitted in electronic format (preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed," provided on the SAB website (see the "Nomination of Experts" link

under “Current Activities” at <http://www.epa.gov/sab>). To receive full consideration, nominations should include all of the information requested below. Nominators unable to submit nominations electronically as described above may contact the DFO, Dr. Holly Stallworth, listed under **FOR FURTHER INFORMATION CONTACT**.

EPA’s SAB Staff Office requests contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee’s resume or curriculum vitae; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB website, should contact the, Dr. Holly Stallworth, listed under **FOR FURTHER INFORMATION CONTACT**.

Nominations should be submitted in time to arrive no later than December 29, 2020. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and biosketches of qualified nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff Office, will be posted in a List of Candidates for the Panel on the SAB website at <http://www.epa.gov/sab>. Public comments on the List of Candidates will be accepted for 15 days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office a balanced review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In forming the expert panel, the SAB Staff Office will consider public comments on the List of Candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for panel membership include: (a)

Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a loss of impartiality; (e) skills working in committees, subcommittees and advisory panels; and, (f) for the panel as a whole, diversity of expertise and scientific points of view.

The SAB Staff Office’s evaluation of an absence of financial conflicts of interest will include a review of the “Confidential Financial Disclosure Form for Environmental Protection Agency Special Government Employees” (EPA Form 3110–48). This confidential form allows government officials to determine whether there is a statutory conflict between a person’s public responsibilities (which include membership on an EPA federal advisory committee) and private interests and activities, or the appearance of a loss of impartiality, as defined by federal regulation. The form may be viewed and downloaded from the following URL address <http://yosemite.epa.gov/sab/sabproduct.nsf/Web/ethics?OpenDocument>.

The approved policy under which the EPA SAB Office selects members for subcommittees and review panels is described in the following document: *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (EPA–SAB–EC–02–010), which is posted on the SAB website at [https://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/\\$File/ec02010.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/$File/ec02010.pdf).

**Thomas Brennan,**

*Director, EPA Science Advisory Board Staff Office.*

[FR Doc. 2020–26472 Filed 11–30–20; 8:45 am]

**BILLING CODE 6560–50–P**

## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA–HQ–OECA–2013–0316; FRL–10017–65–OMS]**

### **Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Onshore Natural Gas Processing Plants (Renewal)**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency has submitted an information collection request (ICR), NSPS for

Onshore Natural Gas Processing Plants (EPA ICR Number 1086.12, OMB Control Number 2060–0120), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through January 31, 2021. Public comments were previously requested, via the **Federal Register**, on May 12, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**DATES:** Additional comments may be submitted on or before December 31, 2020.

**ADDRESSES:** Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0316, to: (1) EPA online using [www.regulations.gov](http://www.regulations.gov) (our preferred method), or by email to [docket.oeca@epa.gov](mailto:docket.oeca@epa.gov), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460; and (2) OMB via email to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov). Address comments to OMB Desk Officer for EPA.

EPA’s policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

#### **FOR FURTHER INFORMATION CONTACT:**

Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: [yellin.patrick@epa.gov](mailto:yellin.patrick@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at [www.regulations.gov](http://www.regulations.gov), or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA’s

public docket, visit: <http://www.epa.gov/dockets>.

**Abstract:** Owners and operators of affected onshore natural gas processing plants are required to comply with reporting and record keeping requirements for the General Provisions (40 CFR part 60, subpart A), as well as for the specific requirements at 40 CFR part 60, subparts KKK and LLL. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These reports are used by EPA to determine compliance with these same standards.

**Form Numbers:** None.

**Respondents/affected entities:** Owners and operators of onshore natural gas processing plants that that commenced construction, reconstruction, or modification after January 20, 1984, and on or before August 23, 2011.

**Respondent's obligation to respond:** Mandatory (40 CFR part 60, subpart KKK and 40 CFR part 60, subpart LLL).

**Estimated number of respondents:** 362 (total).

**Frequency of response:** Semiannually.

**Total estimated burden:** 67,500 hours per year. Burden is defined at 5 CFR 1320.3(b).

**Total estimated cost:** Total labor costs are \$7,990,000 (per year), which includes \$68,400 in annualized capital/startup and/or operation & maintenance costs.

**Changes in the Estimates:** There is an adjustment decrease in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes. The change in the burden and cost estimates occurred because the number of respondents subject to these requirements has decreased as those respondents modify their sources and become subject to another NSPS standard. As sources subject to NSPS Subparts KKK and LLL modify, they become subject to NSPS Subpart OOOOa and cease being subject to NSPS Subparts KKK and LLL. There is also a decrease in the estimated number of respondents subject to NSPS Subpart LLL. This is due to a re-examination of the Agency's ECHO database of sources subject to Subpart LLL with a NAICS code of 211130

(natural gas extraction) and reporting SO<sub>2</sub> emissions.

**Courtney Kerwin,**

*Director, Regulatory Support Division.*

[FR Doc. 2020-26474 Filed 11-30-20; 8:45 am]

**BILLING CODE 6560-50-P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

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 paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than December 16, 2020.

**A. Federal Reserve Bank of Chicago** (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of Northern Trust Corporation, and thereby indirectly acquire additional voting shares of The Northern Trust Company, both of Chicago, Illinois.

2. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of*

*itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of Discover Financial Services, Riverwoods, Illinois, and thereby indirectly acquire additional voting shares of Discover Bank, Greenwood, Delaware.

**B. Federal Reserve Bank of Philadelphia** (William Spaniel, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105-1521. Comments can also be sent electronically to [Comments.applications@phil.frb.org](mailto:Comments.applications@phil.frb.org):

1. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of Synchrony Financial, Stamford, Connecticut, and thereby indirectly acquire additional voting shares of Synchrony Bank, Draper, Utah.

**C. Federal Reserve Bank of San Francisco** (Sebastian Astrada, Director, Applications) 101 Market Street, San Francisco, California 94105-1579:

1. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of SVB Financial Group, and thereby indirectly acquire additional voting shares of Silicon Valley Bank, both of Santa Clara, California.

Board of Governors of the Federal Reserve System, November 25, 2020.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2020-26469 Filed 11-30-20; 8:45 am]

**BILLING CODE P**

## FEDERAL RESERVE SYSTEM

### Privacy Act of 1974; System of Records

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Notice of a modified system of records.

**SUMMARY:** Pursuant to the provisions of the Privacy Act of 1974, notice is given that the Board of Governors of the Federal Reserve System (Board) proposes to modify an existing system of records, entitled BGFRS-33, "FRB—Telephone Call Detail Records" to reflect changes in the format, location, and source of its wireless phone records. The Board also proposes to rename the system of records BGFRS-33, "FRB—Wired and Wireless Telephone Records," as it stores information on the use of Board telephones, both wired and wireless.

**DATES:** Comments must be received on or before December 31, 2020. This modified system of records will become effective December 31, 2020, without further notice, unless comments dictate otherwise.

The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act, requires a 30-day period prior to publication in the **Federal Register** in which to review the system and to provide any comments to the agency. The public is then given a 30-day period in which to comment, in accordance with 5 U.S.C. 552a(e)(4) and (11).

**ADDRESSES:** You may submit comments, identified by BGFRS-33: "FRB—Wired and Wireless Telephone Records", by any of the following methods:

- **Agency Website:** <https://www.federalreserve.gov>. Follow the instructions for submitting comments at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx>.

- **Email:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include SORN name and number in the subject line of the message.

- **Fax:** (202) 452-3819 or (202) 452-3102.

- **Mail:** Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board's website at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx> as submitted, unless modified for technical reasons or to remove sensitive personally identifiable information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** David B. Husband, Counsel, (202) 530-6270, or [david.b.husband@frb.gov](mailto:david.b.husband@frb.gov); Legal Division, Board of Governors of the Federal Reserve System, 20th Street and

Constitution Avenue NW, Washington DC 20551.

**SUPPLEMENTARY INFORMATION:** The Board is modifying this system of records to reflect changes in the format, location, and source of its wireless phone records. The Board previously received wireless phone records from the vendors in paper copy and, after reviewing the records, transferred them to off-site storage. The Board now receives wireless phone records electronically, from both vendors and, in some cases, the devices themselves, and retains the electronic copy. Accordingly, the Board is amending the system name to reflect that the scope of the records stored in this system includes both wired and wireless phone records. The Board is also updating the system managers, adding context on the use of the records, and delineating that both wired and wireless phone records are included in the records.

To reflect these changes, the Board has updated the sections on system location, system manager, and the purposes of the system. The Board has also updated the categories of individuals covered by the system, the categories of records in the system, the record source categories, the policies and practices for retrieval, and the administrative, physical, and technical safeguards sections. Finally, the Board has updated the routine uses section to include a link to the Board's general routine uses. The Board is not amending or establishing any routine uses.

The Board is also making technical changes to BGFRS-33 consistent with the template laid out in OMB Circular No. A-108. Accordingly, the Board has made technical corrections and non-substantive language revisions to the following sections: "Policies and Practices for Storage of Records," "Policies and Practices for Retrieval of Records," "Policies and Practices for Retention and Disposal of Records," "Administrative, Technical and Physical Safeguards," "Record Access Procedures," "Contesting Record Procedures," and "Notification Procedures." The Board has also created the following new sections: "Security Classification" and "History."

**SYSTEM NAME AND NUMBER:**

BGFRS-33 "FRB—Telephone Call Detail Records."

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington,

DC 20551. The vendors are the original sources of the wireless and wired phone records, which the Board retains in its files or an offsite facility.

**SYSTEM MANAGER(S):**

The managers for this system of records are located at the Board's central offices: Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington DC, 20551. The manager for the wireless phone records is Thomas Murphy, Deputy Associate Director, Accounting and Operations, Division of Financial Management, (202) 452-3092, or [Thomas.J.Murphy@frb.gov](mailto:Thomas.J.Murphy@frb.gov). The manager for the wired phone records is Delwyn Lee, Manager—Information Technology, Information Technology Division, (202) 530-6237, or [delwyn.k.lee@frb.gov](mailto:delwyn.k.lee@frb.gov). The manager for wireless phone location-related records is Joseph Ng, Manager, Information Security Operations, Information Technology Division, (202) 452-6406, or [joseph.ng@frb.gov](mailto:joseph.ng@frb.gov).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Sections 10 and 11 of the Federal Reserve Act (12 U.S.C. 243 and 248 (k)).

**PURPOSE(S) OF THE SYSTEM:**

These records are collected and maintained to detect and prevent unauthorized, excessive, or other inappropriate use of the Board's wired and wireless telephones. Records are also utilized for metrics, cost control, investigative purposes, and to protect the integrity of the device and its associated data.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Past and present Board employees, contractors, or other individuals working at the Board, including detailees or secondees, who have been provided a telephone by the Board.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records relating to use of Board telephones to place local and long distance telephone calls; records indicating assignment of telephone numbers to individuals covered by the system; and records relating to location of telephones.

**RECORD SOURCE CATEGORIES:**

Information is provided by the telephone assignment records, call detail listings, the device itself, and the results of administrative inquiries relating to telephone calls that are the subject of the inquiry.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

General routine uses A, B, C, D, F, G, I, and J apply to this system. These general routine uses are located at <https://www.federalreserve.gov/files/SORN-page-general-routine-uses-of-board-systems-of-records.pdf> and are published in the **Federal Register** at 83 FR 43872 at 43873–74 (August 28, 2018). Records may also be used to disclose information to current or former Board employees and other individuals currently or formerly provided telephone services by the Board regarding their usage of the phones.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Paper records (wired phones only) in this system are stored in folders with access limited to staff with a need-to-know. Electronic records (wired and wireless) are stored on a secure server with access limited to staff with a need-to-know.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

Records can be retrieved by name, telephone number, extension, or number(s) dialed.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Wired and wireless telephone use records and wireless telephone location records are retained for three years and wired telephone bills and wireless telephone bills are retained for six years. The retention for wireless telephone use records is under review.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

Board records stored in paper copy are physically secured by lock and key. Board records scanned into the Board's electronic recordkeeping system are stored on secure servers. The recordkeeping system has the ability to track individual user actions within the system and access is restricted to authorized users within the Board who require access for official business purposes. In addition, users are classified into different roles and common access and usage rights are established for each role. User roles delineate between the different types of access requirements such that users are restricted to data that is required in the performance of their duties. Periodic assessments and reviews are conducted to determine whether users still require access, have the appropriate role, and whether there have been any unauthorized changes. These system

controls assist in preventing and detecting security violations and performance or other issues in accordance with NIST and Board standards which, in turn, are based on applicable laws and regulations.

**RECORD ACCESS PROCEDURES:**

The Privacy Act allows individuals the right to access records maintained about them in a Board system of records. Your request for access must: (1) Contain a statement that the request is made pursuant to the Privacy Act of 1974; (2) provide either the name of the Board system of records expected to contain the record requested or a concise description of the system of records; (3) provide the information necessary to verify your identity; and (4) provide any other information that may assist in the rapid identification of the record you seek.

Current or former Board employees may make a request for access by contacting the Board office that maintains the record. The Board handles all Privacy Act requests as both a Privacy Act request and as a Freedom of Information Act request. The Board does not charge fees to a requestor seeking to access or amend his/her Privacy Act records.

You may submit your Privacy Act request to the—Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

You may also submit your Privacy Act request electronically through the Board's FOIA "Electronic Request Form" located here: <https://www.federalreserve.gov/secure/forms/efoiaform.aspx>.

**CONTESTING RECORD PROCEDURES:**

The Privacy Act allows individuals to seek amendment of information that is erroneous, irrelevant, untimely, or incomplete and is maintained in a system of records that pertains to them. To request an amendment to your record, you should clearly mark the request as a "Privacy Act Amendment Request." You have the burden of proof for demonstrating the appropriateness of the requested amendment and you must provide relevant and convincing evidence in support of your request.

Your request for amendment must: (1) Provide the name of the specific Board system of records containing the record you seek to amend; (2) identify the specific portion of the record you seek to amend; (3) describe the nature of and reasons for each requested amendment; (4) explain why you believe the record is not accurate, relevant, timely, or

complete; and (5) unless you have already done so in a related Privacy Act request for access or amendment, provide the necessary information to verify your identity.

**NOTIFICATION PROCEDURES:**

Same as "Access procedures" above. You may also follow this procedure in order to request an accounting of previous disclosures of records pertaining to you as provided for by 5 U.S.C. 552a(c).

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**HISTORY:**

This SORN was previously published in the **Federal Register** at 73 FR 24984 at 24987 (May 6, 2008). The SORN was also amended to incorporate two new routine uses required by OMB at 83 FR 43872 (August 28, 2018).

Board of Governors of the Federal Reserve System.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2020–26430 Filed 11–30–20; 8:45 am]

**BILLING CODE 6210–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Disease Control and Prevention**

[30Day–21–1078]

**Agency Forms Undergoing Paperwork Reduction Act Review**

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled Public Health Associate Program (PHAP) Alumni and Host Site Assessment to the Office of Management and Budget (OMB) for review and approval. CDC previously published a "Proposed Data Collection Submitted for Public Comment and Recommendations" notice on 07/28/2020 to obtain comments from the public and affected agencies. CDC is not aware of any comments submitted on the prior notice, however CDC had two ICRs reference the same Docket Number. If comments were previously submitted to the original 60d FRN (CDC–2020–0081), the comment period has been extended for an additional 60 days. Please submit any comments using the new Docket Number (CDC–2020–0082). This notice serves to allow an additional 30 days for public and affected agency comments.



CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639-7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

### Proposed Project

Public Health Associate Program (PHAP) Alumni and Host Site Assessment (OMB Control No. 0920-1078, Exp. 03/31/2021)—Extension—Center for State, Tribal, Local, and Territorial Support (CSTLTS), Centers for Disease Control and Prevention (CDC).

### Background and Brief Description

The Centers for Disease Control and Prevention (CDC) works to protect America from health, safety and security threats, both foreign and in the U.S. CDC strives to fulfill this mission, in part, through a competent and capable public health workforce. One mechanism to developing the public health workforce is through training programs like the Public Health Associate Program (PHAP).

The mission of the Public Health Associate Program (PHAP) is to train and provide experiential learning to early career professionals who contribute to the public health workforce. PHAP targets recent graduates with bachelor's or master's degrees who are beginning a career in public health. Each year, a new cohort of up to 200 associates is enrolled in the program. Associates are CDC employees who complete two-year assignments in a host site (*i.e.*, a state, tribal, local, or territorial health department or non-profit organization). Host sites design their associates' assignments to meet their agency's unique needs while also providing on-the-job experience that prepare associates for future careers in public health. At host sites, associates are mentored by members of the public health workforce (referred to as "host site supervisors"). It is the goal of PHAP that following participation in the two-year program, alumni will seek employment within the public health system (*i.e.*, federal, state, tribal, local, or territorial health agencies, or non-governmental organizations), focusing on public health, population health, or health care.

Efforts to systematically evaluate PHAP began in 2014 and continue to date. Evaluation priorities focus on continuously learning about program processes and activities to improve the program's quality and documenting program outcomes to demonstrate impact and inform decision making about future program direction.

The purpose of this ICR is to collect information from two key stakeholder groups (host site supervisors and alumni) via two distinct surveys. The information collected will enable CDC to; (a) learn about program processes and activities to improve the program's quality, and (b) document program outcomes to demonstrate impact and inform decision making about future program direction. The results of these surveys may be published in peer reviewed journals and/or in non-scientific publications such as practice reports and/or fact sheets.

The respondent universe is comprised of PHAP host site supervisors and PHAP alumni. Both surveys will be administered electronically; a link to the survey websites will be provided in the email invitation. The PHAP Host Site Supervisor survey will be deployed once every two years to all active PHAP host site supervisors. The total estimated burden is 20 minutes per respondent per survey.

The PHAP Alumni Survey will be administered at three different time points (one year post-graduation, three years post-graduation, and five years post-graduation) to PHAP alumni. Assessment questions will remain consistent at each administration (*i.e.*, one year, three years, or five years post-PHAP graduation). The language, however, will be updated for each survey administration to reflect the appropriate time period. The total estimated burden is 8 minutes per respondent per survey. The total annualized estimated burden is 213 hours.

### ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents              | Form name                              | Number of respondents | Number of responses per respondent | Average burden per response |
|----------------------------------|----------------------------------------|-----------------------|------------------------------------|-----------------------------|
| PHAP Host Site Supervisors ..... | PHAP Host Site Supervisor Survey ..... | 400                   | 1                                  | 20/60                       |
| PHAP Alumni .....                | PHAP Alumni Survey .....               | 600                   | 1                                  | 8/60                        |



Jeffery M. Zirger,

Lead, Information Collection Review Office,  
Office of Scientific Integrity, Office of Science,  
Centers for Disease Control and Prevention.

[FR Doc. 2020-26397 Filed 11-30-20; 8:45 am]

BILLING CODE 4163-18-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Community Living

[OMB #0985-0067]

#### Agency Information Collection Activities; Proposed Collection; Comment Request; Study on the Impact of COVID-19 on Adult Protective Service (APS) Programs

**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 with Revisions and  
solicits comments on the information  
collection requirements related to Study  
on the impact of COVID-19 on Adult  
Protective Service (APS) Programs.

**DATES:** Comments on the collection of  
information must be submitted  
electronically by 11:59 p.m. (EST) or  
postmarked by February 1, 2021.

**ADDRESSES:** Submit electronic  
comments on the collection of  
information to Stephanie Whittier  
Eliason [Stephanie.WhittierEliason@acl.hhs.gov](mailto:Stephanie.WhittierEliason@acl.hhs.gov). Submit written comments

on the collection of information to  
Administration for Community Living,  
Washington, DC 20201, Attention:  
Stephanie Whittier Eliason.

#### FOR FURTHER INFORMATION CONTACT:

Stephanie Whittier Eliason,  
Administration for Community Living,  
Washington, DC 20201, Phone: (202)  
795-7467, E: Mail  
[Stephanie.WhittierEliason@acl.hhs.gov](mailto:Stephanie.WhittierEliason@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 44 U.S.C. 3502(3) and 5 CFR  
1320.3(c) and includes agency requests  
or requirements that members of the  
public submit reports, keep records, or  
provide information to a third party.  
Section 3506(c)(2)(A) of the PRA (44  
U.S.C. 3506(c)(2)(A)) requires Federal  
agencies to provide a 60-day notice in  
the **Federal Register** concerning each  
proposed collection of information,  
including each proposed extension of an  
existing collection of information,  
before submitting the collection to OMB  
for approval. To comply with this  
requirement, 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.

This data collection is an extension of  
ACL's investigation on the impact of  
COVID-19 on APS programs across the  
country. The COVID-19 pandemic is  
causing changes in APS policy and  
practice in several areas, including, but  
not limited to, a reduction of in-person  
interactions with clients, perpetrators,  
and collaterals. As ACL collects  
information on the impact of APS  
during the COVID-19 pandemic, the  
opioid overdose death rates are rising at  
the same time.<sup>1</sup> The opioid epidemic  
affects older adults through opioid  
misuse and is associated with increases  
in elder abuse including physical abuse,  
threatening behavior; emotional abuse;  
and financial exploitation.<sup>2,3</sup>

The revisions to this study includes  
structured individual and group  
interviews with state administrators and  
local field staff to discuss opioid cases  
pre- and during the COVID-19  
pandemic. The study will reveal the  
characteristics of opioid cases in older  
adults and how APS staff are  
responding to these cases. In addition,  
it will compare how these cases are  
handled pre- and during the COVID-19  
pandemic by APS. The findings of the  
study will assist ACL in addressing the  
challenges of opioid cases under normal  
and emergency conditions. In particular,  
it will help to prioritize any policies and  
procedures during and after the COVID-  
19 pandemic to improve APS responses  
to these cases.

The proposed data collection tools  
may be found on the ACL website for  
review at <https://www.acl.gov/about-acl/public-input>.

#### Estimated Program Burden

ACL estimates the burden associated  
with this collection of information as  
follows:

| Respondent/data collection activity      | Number of<br>respondents | Responses per<br>respondent | Hours per<br>response | Annual burden<br>hours |
|------------------------------------------|--------------------------|-----------------------------|-----------------------|------------------------|
| State Administrator Interviews .....     | 12                       | 1                           | .75                   | 9                      |
| Local Field Staff Group Interviews ..... | 60                       | 1                           | .75                   | 45                     |
| Total: .....                             |                          |                             |                       | 54                     |

<sup>1</sup> Haley DF, Saitz R. The Opioid Epidemic During  
the COVID-19 Pandemic. *JAMA*. Published online  
September 18, 2020. doi:10.1001/jama.2020.18543.

<sup>2</sup> Blog Post (March 4, 2019): <https://eldermistreatment.usc.edu/opioids-and-elder-abuse-a-disquieting-connection/>.

<sup>3</sup> Washington Post Article (June 17, 2019): [https://www.washingtonpost.com/business/2019/06/17/how-opioid-crisis-is-leading-elder-financial-abuse/?utm\\_term=.594b4dd84d9d](https://www.washingtonpost.com/business/2019/06/17/how-opioid-crisis-is-leading-elder-financial-abuse/?utm_term=.594b4dd84d9d).

Dated: November 25, 2020.

**Lance Robertson,**

*Administrator and Assistant Secretary for Aging.*

[FR Doc. 2020-26513 Filed 11-30-20; 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; Inventory of Adult Protective Services Practices and Service Innovations

**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 survey previously ran a 60-day FRN in 83 FR 66276 on 12/26/2018. As required under the PRA we are providing the public an opportunity to comment on any changes or updates applied to this IC since the 2018 publication. We are requesting an abbreviated public comment period for additional 30-days prior to publication of a 30-day FRN and submittal to OMB.

Any changes to the survey from the initial 60-day FRN publication are incorporated into the revised version of the survey. This notice solicits comments on any revisions since the initial publication in 2018. This is a new information collection 0985-New Inventory of Adult Protective Services Practices and Service Innovations.

**DATES:** Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by December 31, 2020.

**ADDRESSES:** Submit electronic comments on the collection of information to Stephanie Whittier Eliason [Stephanie.WhittierEliason@acl.hhs.gov](mailto:Stephanie.WhittierEliason@acl.hhs.gov). Submit written comments on the collection of information to Administration for Community Living, Washington, DC 20201, Attention: Stephanie Whittier Eliason

#### FOR FURTHER INFORMATION CONTACT:

Stephanie Whittier Eliason, Administration for Community Living, Washington, DC 20201, Phone: (202) 795-7467, Email:

[Stephanie.WhittierEliason@acl.hhs.gov](mailto:Stephanie.WhittierEliason@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 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide 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.

#### Authority

The Elder Justice Act of 2009 requires the Secretary of the U.S. Department of Health and Human Services to carry out a number of activities related to adult protective services (APS) (42 U.S.C. 1397m-1), including developing and disseminating information on APS best practices and conducting research related to the provision of APS.

Furthermore, the Elder Justice Coordinating Council included as its third recommendation for increasing federal involvement in addressing elder

abuse, neglect, and exploitation: "develop a national APS system based upon standardized data collection and a core set of service provision standards and best practices."

#### Background

The Administration for Community Living (ACL) in the U.S. Department of Health and Human Services (HHS) plans to initiate an Inventory of Adult Protective Services Practices and Service Innovations (APS Practice Survey) in early 2021. Under a contract with ACL, the National Adult Protective Services Technical Assistance Resource Center (APS TARC) is conducting a national program evaluation of APS programs. As part of this evaluation, the APS Practice Survey will identify barriers to meeting policy mandates, and practice innovations and model programs that address such barriers and community-identified needs. It also seeks to identify practice variations in the way APS programs serve older adults and adults with disabilities.

The results of the survey will serve to advance the field of APS and will be useful to many audiences. It will provide baseline information regarding the status of APS programs and services, and the resulting information will help states and territories compare their program characteristics with those of other states and territories. The survey will provide a context for other researchers examining APS programs. It will inform ACL's efforts to support improvement of APS programs through activities such as innovation grants. Finally, it will inform the APS TARC team's efforts to develop resources to enhance APS programs around the country.

This survey has been developed to gather information on APS practices that is not available from other sources. As part of the National Adult Maltreatment Reporting System (NAMRS), ACL collects descriptive data on state and territory agency policies through the Agency Component of that data collection.

Therefore, the proposed survey will not collect any background policy or data items. As part of the APS Program Evaluation, the APS TARC also conducted a detailed examination of state APS policies through development of individual state policy profiles. The profiles were based exclusively on extant information sources obtained without additional data requests from the states. Information on practices gathered in this survey will complement, but will not duplicate, these policy profiles.

Finally, the National Adult Protective Services Association (NAPSA) conducted a survey of State APS programs in 2012, and the National Association of State Units on Aging and Disability (NASUAD) fielded a survey to its members, which are not APS programs, in January 2018 intended to update findings from the NAPSA 2012 survey. Since the survey replicates the original NAPSA survey, the questions in it are not focused on APS practice and are not directed at the same respondents as the proposed survey. As noted, a few topics in the original survey overlap with the proposed instrument, but the wording and focus of the few questions on similar topics are different. From this analysis, we conclude the proposed APS Practice Survey will yield vital information on APS practice not available from other sources.

#### Proposed Collection Efforts

The APS Practice Survey will collect state- and territory-specific practices for

all aspects of APS casework practice, including staffing, intake, investigation, service planning and delivery, and quality assurance. Across these areas, the survey will collect information on practices such as community partnerships and use of assessment tools.

The APS Practice Survey will be administered online using SurveyMonkey or a similar commercial survey-programming tool. The online survey will include data validation routines to minimize errors or unintentional omissions and will include appropriate skip patterns to reduce burden. Respondents will be state and territory APS agencies, including APS agencies in the District of Columbia, Puerto Rico, Guam, Northern Marianas Islands, Virgin Islands, and American Samoa. No personally identifiable information will be collected.

A pilot version of The APS Practice Survey was tested in nine (9) diverse

states between July and September 2017. Following their pretest of the survey instrument, pilot respondents participated in focus groups in which they provided recommendations on data collection procedures, views on the availability of data being requested, and estimates of the burden to each state and territory for completion of the survey. It is assumed that nearly every state and territory will participate and that time to develop a response will be similar to the experience of states during the pilot test. ACL has calculated the following burden estimates based on the results of the survey pilot test.

To review and comment on the proposed data collection, please visit the ACL public input site at <https://www.acl.gov/about-acl/public-input>.

#### Estimated Program Burden

ACL estimates the annual burden associated with this collection of information as follows:

| Instrument                | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---------------------------|-----------------------|------------------------------------|-----------------------------------|--------------------|
| APS Practice Survey ..... | 56                    | 1                                  | 3.50                              | 196                |

*Estimated Total Annual Burden Hours: 196.*

Dated: November 25, 2020.

**Lance Robertson,**

*Administrator and Assistant Secretary for Aging.*

[FR Doc. 2020-26514 Filed 11-30-20; 8:45 am]

**BILLING CODE 4154-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2020-N-1671]

#### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Good Laboratory Practice for Nonclinical Laboratory Studies

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Submit written comments (including recommendations) on the collection of information by December 31, 2020.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be submitted 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. The OMB control number for this information collection is 0910-0119. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, [PRASStaff@fda.hhs.gov](mailto:PRASStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### Good Laboratory Practice for Nonclinical Laboratory Studies—21 CFR Part 58

*OMB Control Number 0910-0119—Extension*

Sections 409, 505, 512, and 515 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348, 355, 360b, and 360e) and related statutes require manufacturers of food additives, human drugs and biological products, animal drugs, and medical devices to demonstrate the safety and utility of their product by submitting applications to FDA for research or marketing permits. Such applications contain, among other important items, full reports of all studies done to demonstrate product safety in man and/or other animals. In order to ensure adequate quality control for these studies and to provide an adequate degree of consumer protection, the Agency issued good laboratory practice (GLP) regulations for nonclinical laboratory studies in part 58 (21 CFR part 58). The regulations specify minimum standards for the proper conduct of safety testing and contain sections on facilities, personnel, equipment, standard operating procedures (SOPs), test and control articles, quality assurance, protocol and conduct of a safety study, records and reports, and laboratory disqualification,

and include information collection provisions.

Part 58 requires testing facilities engaged in conducting toxicological studies to retain, and make available to regulatory officials, records regarding compliance with GLPs. Records are maintained on file at each testing facility and examined there periodically by FDA inspectors. The GLP regulations require that, for each nonclinical laboratory study, a final report be prepared that documents the results of quality assurance unit inspections, test and control article characterization, testing of mixtures of test and control articles with carriers, and an overall

interpretation of nonclinical laboratory studies. The GLP regulations also require written records pertaining to: (1) Personnel job descriptions and summaries of training and experience; (2) master schedules, protocols and amendments thereto, inspection reports, and SOPs; (3) equipment inspection, maintenance, calibration, and testing records; (4) documentation of feed and water analyses and animal treatments; (5) test article accountability records; and (6) study documentation and raw data.

In the **Federal Register** of July 24, 2020 (85 FR 44900), FDA published a 60-day notice requesting public

comment on the proposed collection of information.

One comment was received that encouraged implementation of automated collection methods and analytical software to evaluate results. FDA appreciates this comment and continually seek ways to employ efficient collection methods using our limited resources. The comment suggested no revision to our burden estimate.

FDA estimates the burden of this information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

| 21 CFR part                                               | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|-----------------------------------------------------------|-----------------------|------------------------------------|------------------------|-----------------------------|-------------|
| 58.35(b)(7); Quality assurance unit                       | 300                   | 60.25                              | 18,075                 | 1                           | 18,075      |
| 58.185; Reporting of nonclinical laboratory study results | 300                   | 60.25                              | 18,075                 | 27.65                       | 499,774     |
| Total                                                     |                       |                                    |                        |                             | 517,849     |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

| 21 CFR part                                                   | Number of recordkeepers | Number of records per recordkeeper | Total annual records | Average burden per recordkeeping | Total hours |
|---------------------------------------------------------------|-------------------------|------------------------------------|----------------------|----------------------------------|-------------|
| 58.29(b); Personnel                                           | 300                     | 20                                 | 6,000                | .21 (13 minutes)                 | 1,260       |
| 58.35(b)(1)–(6) and (c); Quality assurance unit               | 300                     | 270.76                             | 81,228               | 3.36                             | 272,926     |
| 58.63(b) and (c); Maintenance and calibration of equipment.   | 300                     | 60                                 | 18,000               | .09 (5 minutes)                  | 1,620       |
| 58.81(a)–(c); SOPs                                            | 300                     | 301.80                             | 90,540               | .14 (8 minutes)                  | 12,676      |
| 58.90(c) and (g); Animal care                                 | 300                     | 62.70                              | 18,810               | .13 (8 minutes)                  | 2,445       |
| 58.105(a) and (b); Test and control article characterization. | 300                     | 5                                  | 1,500                | 11.8                             | 17,700      |
| 58.107(d); Test and control article handling                  | 300                     | 1                                  | 300                  | 4.25                             | 1,275       |
| 58.113(a); Mixtures of articles with carriers                 | 300                     | 15.33                              | 4,599                | 6.8                              | 31,273      |
| 58.120; Protocol                                              | 300                     | 15.38                              | 4,614                | 32.7                             | 150,878     |
| 58.195; Retention of records                                  | 300                     | 251.50                             | 75,450               | 3.9                              | 294,255     |
| Total                                                         |                         |                                    |                      |                                  | 786,308     |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, FDA has made no adjustments to our burden estimate.

Dated: November 24, 2020.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2020–26502 Filed 11–30–20; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2019–N–1845]

#### **Fixed-Quantity Unit-of-Use Blister Packaging for Certain Immediate-Release Opioid Analgesics for Treatment of Acute Pain; Establishment of a Public Docket; Request for Comments; Reopening of the Comment Period and Provision of Additional Information and Analysis**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; reopening of the comment period.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) is reopening the comment period for and providing additional information and analysis regarding the notice entitled “Fixed-Quantity Unit-of-Use Blister Packaging for Certain Immediate-Release Opioid Analgesics for Treatment of Acute Pain; Establishment of a Public Docket; Request for Comments” that appeared in the **Federal Register** of May 31, 2019. The Agency is taking this action to provide additional information and to allow

interested persons additional time to submit comments.

**DATES:** FDA is reopening the comment period for the notice published on May 31, 2019 (84 FR 25283). Submit either electronic or written comments on the notice by February 1, 2021.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 1, 2021. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 1, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### *Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management

Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

**Instructions:** All submissions received must include the Docket No. FDA-2019-N-1845 for "Fixed-Quantity Unit-of-Use Blister Packaging for Certain Immediate-Release Opioid Analgesics for Treatment of Acute Pain." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **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, 240-402-7500.

#### **FOR FURTHER INFORMATION CONTACT:**

Patrick Raulerson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6260, Silver Spring, MD 20993, 301-796-3522, [Patrick.Raulerson@fda.hhs.gov](mailto:Patrick.Raulerson@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of May 31, 2019 (84 FR 25283), FDA published a notice entitled "Fixed-Quantity Unit-of-Use Blister Packaging for Certain Immediate-Release Opioid Analgesics for Treatment of Acute Pain; Establishment of a Public Docket; Request for Comments" with a 60-day comment period. The notice described a potential modification to the Opioid Analgesic Risk Evaluation and Mitigation Strategy (REMS) to require that certain solid, oral dosage forms of immediate-release opioid analgesics commonly prescribed for treatment of acute pain be made available in fixed-quantity unit-of-use blister packaging for outpatient dispensing. The intent would be to reduce the amount of unused opioid analgesics, thereby reducing opportunities for misuse, abuse, inappropriate access, and overdose, and possibly reducing the development of new opioid addiction. Prescribers would continue to exercise their clinical judgement to prescribe opioid analgesics in the quantity appropriate for a given patient. That is, the blister packaging configurations under consideration would not be required to be the only packaging option available for these products.

Following an initial review of comments received, FDA held a series of listening sessions with stakeholders, which included an FDA slide presentation containing additional information and analysis regarding this potential REMS modification. FDA is now reopening the comment period to obtain additional written comments from stakeholders and to add to the docket this slide presentation. The comment period will be open until February 1, 2021. The Agency believes that an additional 60 days will allow adequate time for interested persons to submit comments.

Dated: November 24, 2020.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2020-26504 Filed 11-30-20; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2020-D-1794]

#### Evaluation of Gastric pH-Dependent Drug Interactions With Acid-Reducing Agents: Study Design, Data Analysis, and Clinical Implications; Draft Guidance for Industry; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled "Evaluation of Gastric pH-Dependent Drug Interactions With Acid-Reducing Agents: Study Design, Data Analysis, and Clinical Implications." This draft guidance focuses on specific recommendations pertinent to gastric pH-dependent drug-drug interaction (DDI) assessment and describes the FDA's recommendations regarding when clinical DDI studies with acid-reducing agents (ARAs) are needed; design of the clinical studies; interpretation of study results; and communicating findings and options for managing pH-dependent DDIs in product labeling.

**DATES:** Submit either electronic or written comments on the draft guidance by March 1, 2021 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments on any guidance at any time as follows:

#### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

*Instructions:* All submissions received must include the Docket No. FDA-2020-D-1794 for "Evaluation of Gastric pH-Dependent Drug Interactions With Acid-Reducing Agents: Study Design, Data Analysis, and Clinical Implications." 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 the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:** Anuradha Ramamoorthy, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3118, Silver Spring, MD 20993, 240-402-6426.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Evaluation of Gastric pH-Dependent Drug Interactions With Acid-Reducing Agents: Study Design, Data Analysis, and Clinical Implications." ARAs such as antacids, histamine H2-receptor antagonists, and proton pump inhibitors are widely used, and many of these drugs are available over-the-counter. Because ARAs can elevate the gastric pH, concomitant administration of a drug with an ARA could alter the solubility, dissolution, and bioavailability of the drug, potentially resulting in a loss of efficacy for weak-base drugs or increased toxicity for weak-acid drugs. Therefore, it is important to assess the susceptibility of an investigational drug to gastric pH change-mediated DDIs early in drug development, characterize the DDI effect with clinical studies when needed, and communicate the findings in the drug product labeling. This draft guidance addresses when clinical DDI studies with ARAs should be conducted, the design and conduct of clinical pH-

dependent DDI studies, alternative approaches for evaluating pH-dependent DDIs, and extrapolating clinical DDI study results with drug classes of ARAs.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "Evaluation of Gastric pH-Dependent Drug Interactions With Acid-Reducing Agents: Study Design, Data Analysis, and Clinical Implications." 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

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information for submissions of investigational new drug applications, new drug applications, and biologic license applications in 21 CFR parts 312, 314, and 601 have been approved under OMB control numbers 0910–0014; 0910–0001; and 0910–0338, respectively. In addition, the submission of prescription drug labeling under 21 CFR 201.56 and 201.57 has been approved under OMB control number 0910–0572.

## III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs> or <https://www.regulations.gov>.

Dated: November 25, 2020.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2020–26510 Filed 11–30–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2011–N–0076]

#### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Electronic Records; Electronic Signatures

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Submit written comments (including recommendations) on the collection of information by December 31, 2020.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be submitted 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. The OMB control number for this information collection is 0910–0303. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, [PRAStaff@fda.hhs.gov](mailto:PRAStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### Electronic Records; Electronic Signatures—21 CFR Part 11

*OMB Control Number 0910–0303—Extension*

This information collection supports FDA regulations in part 11 (21 CFR part 11), which govern criteria for acceptance of electronic records, electronic signatures, and handwritten signatures executed to electronic records as equivalent to paper records. Under these regulations, records and reports may be submitted to us

electronically provided that we have stated our ability to accept the records electronically in an Agency-established public docket and that the other requirements of part 11 are met.

The recordkeeping provisions in §§ 11.10, 11.30, 11.50, and 11.300 (21 CFR 11.10, 11.30, 11.50, and 11.300) require the following standard operating procedures to ensure appropriate use of and precautions for systems using electronic records and signatures: (1) § 11.10 specifies procedures and controls for persons who use closed systems to create, modify, maintain, or transmit electronic records; (2) § 11.30 specifies procedures and controls for persons who use open systems to create, modify, maintain, or transmit electronic records; (3) § 11.50 specifies procedures and controls for persons who use electronic signatures; and (4) § 11.300 specifies controls to ensure the security and integrity of electronic signatures based upon use of identification codes in combination with passwords. The reporting provision (§ 11.100) requires persons to certify to us in writing that they will regard electronic signatures used in their systems as the legally binding equivalent of traditional handwritten signatures.

The burden created by the information collection provision of this regulation is a one-time burden associated with the creation of standard operating procedures, validation, and certification. We anticipate that the use of electronic media will substantially reduce the paperwork burden associated with maintaining FDA-required records. The respondents are businesses and other for-profit organizations, State or local governments, Federal Agencies, and nonprofit institutions.

To assist respondents with the information collection we have developed the guidance document entitled "Guidance for Industry: Part 11, Electronic Records; Electronic Signatures—Scope and Application," available on our website at <https://www.fda.gov/media/75414/download>. While we do not believe the guidance creates any attendant burden, it describes the Agency's thinking regarding persons who, in fulfillment of a requirement in a statute or another part of FDA's regulations to maintain records or submit information to FDA, have chosen to maintain the records or submit designated information electronically and, as a result, have become subject to part 11. Part 11 applies to records in electronic form that are created, modified, maintained, archived, retrieved, or transmitted under any records requirements set forth in Agency regulations. Part 11 also

applies to electronic records submitted to the Agency under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, even if such records are not specifically identified in Agency regulations (§ 11.1).

In the **Federal Register** of August 13, 2020 (85 FR 49381), we published a 60-day notice requesting public comment on the proposed collection of information. One comment was received

but was not responsive to the information collection topics solicited.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

| 21 CFR section | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|----------------|-----------------------|------------------------------------|------------------------|-----------------------------|-------------|
| § 11.100 ..... | 4,500                 | 1                                  | 4,500                  | 1                           | 4,500       |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

| 21 CFR section | Number of recordkeepers | Number of record per recordkeepers | Total annual records | Average burden per recordkeeping | Total hours |
|----------------|-------------------------|------------------------------------|----------------------|----------------------------------|-------------|
| § 11.10 .....  | 2,500                   | 1                                  | 2,500                | 20                               | 50,000      |
| § 11.30 .....  | 2,500                   | 1                                  | 2,500                | 20                               | 50,000      |
| § 11.50 .....  | 4,500                   | 1                                  | 4,500                | 20                               | 90,000      |
| § 11.300 ..... | 4,500                   | 1                                  | 4,500                | 20                               | 90,000      |
| Total .....    |                         |                                    |                      |                                  | 280,000     |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: November 23, 2020.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2020–26487 Filed 11–30–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis

Panel; Review of NIGMS SCORE Applications.

*Date:* December 17, 2020.

*Time:* 4:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* John J. Laffan, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892, (301) 594–2773, [laffanjo@mail.nih.gov](mailto:laffanjo@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: November 24, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–26431 Filed 11–30–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Microbiome and Aging 1.

*Date:* January 7, 2021.

*Time:* 12:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Bitu Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 402–7701, [nakhaib@nia.nih.gov](mailto:nakhaib@nia.nih.gov).



*Name of Committee:* National Institute on Aging Special Emphasis Panel; Frailty and Cancer.

*Date:* January 15, 2021.

*Time:* 12:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Bitu Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 402-7701, [nakhaib@nia.nih.gov](mailto:nakhaib@nia.nih.gov). (Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: November 24, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-26426 Filed 11-30-20; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Early AD Pathological Mechanisms.

*Date:* January 8, 2021.

*Time:* 12:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892 (301) 480-1266, [neuhuber@ninds.nih.gov](mailto:neuhuber@ninds.nih.gov).

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Program Project.

*Date:* March 16, 2021.

*Time:* 10:15 a.m. to 2:45 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Dario Dieguez, Jr., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 827-3101, [dario.dieguez@nih.gov](mailto:dario.dieguez@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: November 24, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-26424 Filed 11-30-20; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Gastrointestinal Small Business applications.

*Date:* December 10, 2020.

*Time:* 10:00 a.m. to 1:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Santanu Banerjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2106, Bethesda, MD 20892 (301) 435-5947, [banerjees5@mail.nih.gov](mailto:banerjees5@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. 93.306, Comparative Medicine;

93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 24, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-26425 Filed 11-30-20; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine and Oral Fluid Drug Testing for Federal Agencies

**AGENCY:** Substance Abuse and Mental Health Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Urine or Oral Fluid (Mandatory Guidelines).

#### FOR FURTHER INFORMATION CONTACT:

Anastasia Donovan, Division of Workplace Programs, SAMHSA/CSAP, 5600 Fishers Lane, Room 16N06B, Rockville, Maryland 20857; 240-276-2600 (voice); [Anastasia.Donovan@samhsa.hhs.gov](mailto:Anastasia.Donovan@samhsa.hhs.gov) (email).

**SUPPLEMENTARY INFORMATION:** A notice listing all currently HHS-certified laboratories and IITFs is published in the **Federal Register** during the first week of each month. If any laboratory or IITF certification is suspended or revoked, the laboratory or IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory or IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the internet at <https://www.samhsa.gov/workplace/resources/drug-testing/certified-lab-list>.

The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs)

currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) using Urine and of the laboratories currently certified to meet the standards of the Mandatory Guidelines using Oral Fluid.

The Mandatory Guidelines using Urine were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); April 30, 2010 (75 FR 22809); and on January 23, 2017 (82 FR 7920).

The Mandatory Guidelines using Oral Fluid were first published in the **Federal Register** on October 25, 2019 (84 FR 57554) with an effective date of January 1, 2020.

The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Pub. L. 100-71 and allowed urine drug testing only. The Mandatory Guidelines using Urine have since been revised, and new Mandatory Guidelines allowing for oral fluid drug testing have been published. The Mandatory Guidelines require strict standards that laboratories and IITFs must meet in order to conduct drug and specimen validity tests on specimens for federal agencies. HHS does not allow IITFs to conduct oral fluid testing.

To become certified, an applicant laboratory or IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory or IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and IITFs in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines using Urine and/or Oral Fluid. An HHS-certified laboratory or IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA), which attests that the test facility has met minimum standards. HHS does not allow IITFs to conduct oral fluid testing.

#### **HHS-Certified Laboratories Approved To Conduct Oral Fluid Drug Testing**

In accordance with the Mandatory Guidelines using Oral Fluid dated October 25, 2019 (84 FR 57554), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on oral fluid specimens: At this time, there are no laboratories certified to conduct drug

and specimen validity tests on oral fluid specimens.

#### **HHS-Certified Instrumented Initial Testing Facilities Approved To Conduct Urine Drug Testing**

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified IITFs meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Dynacare, 6628 50th Street NW, Edmonton, AB Canada T6B 2N7, 780-784-1190 (Formerly: Gamma-Dynacare Medical Laboratories)

#### **HHS-Certified Laboratories Approved To Conduct Urine Drug Testing**

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504-361-8989/800-433-3823, (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.)

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804-378-9130 (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.)

Clinical Reference Laboratory, Inc., 8433 Quivira Road, Lenexa, KS 66215-2802, 800-445-6917

Cordant Health Solutions, 2617 East L Street, Tacoma, WA 98421, 800-442-0438 (Formerly: STERLING Reference Laboratories)

Desert Tox, LLC, 5425 E Bell Rd, Suite 125, Scottsdale, AZ 85254, 602-457-5411/623-748-5045

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800-235-4890

Dynacare \*, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519-679-1630, (Formerly: Gamma-Dynacare Medical Laboratories)

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662-236-2609

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713-856-8288/800-800-2387

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908-526-2400/800-437-4986 (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 TW Alexander Drive,

Research Triangle Park, NC 27709, 919-572-6900/800-833-3984 (Formerly: LabCorp Occupational Testing Services, Inc.; CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866-827-8042/800-233-6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913-888-3927/800-873-8845 (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.)

Legacy Laboratory Services Toxicology, 1225 NE 2nd Ave., Portland, OR 97232, 503-413-5295/800-950-5295

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651-636-7466/800-832-3244

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612-725-2088, Testing for Veterans Affairs (VA) Employees Only

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800-328-6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Phamatech, Inc., 15175 Innovation Drive, San Diego, CA 92128, 888-635-5840

Quest Diagnostics Incorporated, 1777 Montreal Circle, Tucker, GA 30084, 800-729-6432 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610-631-4600/877-642-2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Redwood Toxicology Laboratory, 3700 Westwind Blvd., Santa Rosa, CA 95403, 800-255-2159

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755-5235, 301-677-7085, Testing for Department of Defense (DoD) Employees Only

\* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that

program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on January 23, 2017 (82 FR

7920). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Anastasia Marie Donovan,  
Policy Analyst.

[FR Doc. 2020-26440 Filed 11-30-20; 8:45 am]

BILLING CODE 4160-20-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA-2020-0002; Internal Agency Docket No. FEMA-B-2070]

### Proposed Flood Hazard Determinations; Correction

AGENCY: Federal Emergency Management Agency; DHS.

ACTION: Notice; correction.

**SUMMARY:** FEMA published a document in the **Federal Register** of October 6, 2020, concerning a proposed flood hazard determination. The document contained an erroneous table.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbabit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacbabit@fema.dhs.gov](mailto:patrick.sacbabit@fema.dhs.gov); or visit the FEMA Mapping and Insurance eXchange (FMIX) online at [https://www.floodmaps.fema.gov/fhm/fmx\\_main.html](https://www.floodmaps.fema.gov/fhm/fmx_main.html).

### SUPPLEMENTARY INFORMATION:

#### Correction

In the **Federal Register** of October 6, 2020, in FR Doc 2020-22084, on page 63132, correct the table containing data for Louisa County, Iowa and Incorporated Areas to read:

| Community                                                                                                           | Community map repository address                                    |
|---------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|
| <b>Louisa County, Iowa and Incorporated Areas</b><br><b>Project: 15-07-0720S Preliminary Date: January 31, 2020</b> |                                                                     |
| City of Columbus Junction .....                                                                                     | City Hall, 232 2nd Street, Columbus Junction, IA 52738.             |
| City of Fredonia .....                                                                                              | Louisa County Courthouse, 117 South Main Street, Wapello, IA 52653. |
| City of Letts .....                                                                                                 | City Hall, 125 East Iowa Street, Letts, IA 52754.                   |
| City of Morning Sun .....                                                                                           | City Hall, 11 East Division Street, Morning Sun, IA 52640.          |
| City of Oakville .....                                                                                              | City Hall, 601 2nd Street, Oakville, IA 52646.                      |
| City of Wapello .....                                                                                               | City Hall, 335 North Main Street, Wapello, IA 52653.                |
| Unincorporated Areas of Louisa County .....                                                                         | Louisa County Courthouse, 117 South Main Street, Wapello, IA 52653. |

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2020-26486 Filed 11-30-20; 8:45 am]

BILLING CODE 9110-12-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA-2020-0002; Internal Agency Docket No. FEMA-B-2073]

### Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

**SUMMARY:** This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone

designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

**DATES:** These flood hazard determinations will be finalized on the dates listed in the table below and

revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

**ADDRESSES:** The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacbibit@fema.dhs.gov](mailto:patrick.sacbibit@fema.dhs.gov); or visit the FEMA Mapping and Insurance eXchange (FMIX) online at [https://www.floodmaps.fema.gov/fhm/fmx\\_main.html](https://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer

of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact

stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

**Michael M. Grimm,**

*Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.*

| State and county | Location and case No.                                    | Chief executive officer of community                                                                                             | Community map repository                                                                     | Online location of letter of map revision                                                           | Date of modification | Community No. |
|------------------|----------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|----------------------|---------------|
| Alabama:         |                                                          |                                                                                                                                  |                                                                                              |                                                                                                     |                      |               |
| Tuscaloosa ..    | City of Northport (20-04-4421P).                         | The Honorable Donna Aaron, Mayor, City of Northport, 3500 McFarland Boulevard, Northport, AL 35476.                              | City Hall, 3500 McFarland Boulevard, Northport, AL 35476.                                    | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 2, 2021 .....   | 010202        |
| Tuscaloosa ..    | Unincorporated areas of Tuscaloosa County (20-04-4421P). | The Honorable Rob Robertson, Probate Judge, Tuscaloosa County, 714 Greensboro Avenue, Tuscaloosa, AL 35401.                      | Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.           | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 2, 2021 .....   | 010201        |
| Colorado:        |                                                          |                                                                                                                                  |                                                                                              |                                                                                                     |                      |               |
| Boulder .....    | City of Boulder (20-08-0632P).                           | The Honorable Sam Weaver, Mayor, City of Boulder, P.O. Box 791, Boulder, CO 80306.                                               | Central Records Department, 1777 Broadway Street, Boulder, CO 80302.                         | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 19, 2021 ....   | 080024        |
| Boulder .....    | Unincorporated areas of Boulder County (20-08-0632P).    | The Honorable Deb Gardner, Chair, Boulder County Board of Commissioners, P.O. Box 471, Boulder, CO 80306.                        | Boulder County Department of Public Works, 1739 Broadway, Suite 300, Boulder, CO 80306.      | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 19, 2021 ....   | 080023        |
| Welder .....     | City of Greeley (20-08-0390P).                           | The Honorable John Gates, Mayor, City of Greeley, 1000 10th Street, Greeley, CO 80631.                                           | City Hall, 1000 10th Street, Greeley, CO 80631.                                              | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 080184        |
| Florida:         |                                                          |                                                                                                                                  |                                                                                              |                                                                                                     |                      |               |
| Broward .....    | City of Fort Lauderdale (19-04-3955P).                   | The Honorable Dean J. Trantalis, Mayor, City of Fort Lauderdale, 100 North Andrews Avenue, 8th Floor, Fort Lauderdale, FL 33311. | Department of Sustainable Development, 700 Northwest 19th Avenue, Fort Lauderdale, FL 33311. | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Mar. 1, 2021 .....   | 125105        |
| Broward .....    | City of Tamarac (19-04-3955P).                           | The Honorable Michelle J. Gomez, Mayor, City of Tamarac, 7525 Northwest 88th Avenue, Tamarac, FL 33321.                          | City Hall, 7525 Northwest 88th Avenue, Tamarac, FL 33321.                                    | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Mar. 1, 2021 .....   | 120058        |
| Leon .....       | City of Tallahassee (19-04-5234P).                       | The Honorable John E. Dailey, Mayor, City of Tallahassee, 300 South Adams Street, Tallahassee, FL 32301.                         | Stormwater Management Department, 408 North Adams Street, Tallahassee, FL 32301.             | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 22, 2021 ....   | 120144        |

| State and county          | Location and case No.                                  | Chief executive officer of community                                                                                                | Community map repository                                                                                                               | Online location of letter of map revision                                                           | Date of modification | Community No. |
|---------------------------|--------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|----------------------|---------------|
| Leon .....                | Unincorporated areas of Leon County (19–04–5234P).     | The Honorable Bryan Desloge, Chairman, Leon County Commission, 301 South Monroe Street, Tallahassee, FL 32301.                      | Leon County Department of Development Support and Environmental Management, 435 North Macomb Street, 2nd Floor, Tallahassee, FL 32301. | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 22, 2021 ....   | 120143        |
| Monroe .....              | City of Marathon (20–04–4546P).                        | The Honorable Steve Cook, Mayor, City of Marathon, 9805 Overseas Highway, Marathon, FL 33050.                                       | Planning Department, 9805 Overseas Highway, Marathon, FL 33050.                                                                        | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 120681        |
| Monroe .....              | Unincorporated areas of Monroe County (20–04–4048P).   | The Honorable Heather Carruthers, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040. | Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.                                               | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 22, 2021 ....   | 125129        |
| Monroe .....              | Unincorporated areas of Monroe County (20–04–4807P).   | The Honorable Heather Carruthers, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040. | Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.                                               | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 125129        |
| Palm Beach                | Village of Royal Palm Beach (20–04–3502P).             | The Honorable Fred Pinto, Mayor, Village of Royal Palm Beach, 1050 Royal Palm Beach Boulevard, Royal Palm Beach, FL 33411.          | Village Hall, 1050 Royal Palm Beach Boulevard, Royal Palm Beach, FL 33411.                                                             | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 9, 2021 .....   | 120225        |
| Sarasota .....            | Unincorporated areas of Sarasota County (20–04–4720P). | The Honorable Michael A. Moran, Chairman, Sarasota County Board of Commissioners, 1660 Ringling Boulevard, Sarasota, FL 34236.      | Sarasota County Planning and Development Services Department, 1001 Sarasota Center Boulevard, Sarasota, FL 34240.                      | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 11, 2021 ....   | 125144        |
| Georgia: Bryan .....      | Unincorporated areas of Bryan County (20–04–2261P).    | The Honorable Carter Infinger, Chairman, Bryan County Board of Commissioners, P.O. Box 430, Pembroke, GA 31321.                     | Bryan County Department of Community Development, 66 Captain Matthew Freeman Drive, Suite 201, Richmond Hill, GA 31324.                | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 5, 2021 .....   | 130016        |
| Douglas .....             | Unincorporated areas of Douglas County (20–04–2682P).  | Ms. Romona Jackson Jones, Chair, Douglas County Board of Commissioners, 8700 Hospital Drive, 3rd Floor, Douglasville, GA 30134.     | Douglas County Engineering Division, 8700 Hospital Drive, 1st Floor, Douglasville, GA 30134.                                           | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 130306        |
| Maine: Kennebec ....      | City of Waterville (20–01–0604P).                      | Mr. Michael Roy, Manager, City of Waterville, 1 Common Street, Waterville, ME 04901.                                                | Town Hall, 1 Common Street, Waterville, ME 04901.                                                                                      | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 19, 2021 ....   | 230070        |
| Knox .....                | Town of Vinalhaven (20–01–0545P).                      | Mr. Andrew J. Dorr, Manager, Town of Vinalhaven, 19 Washington School Road, Vinalhaven, ME 04863.                                   | Planning and Community Development Department, 19 Washington School Road, Vinalhaven, ME 04863.                                        | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Jan. 29, 2021 ....   | 230230        |
| Montana: Gallatin         | City of Bozeman (20–08–0561P).                         | Mr. Jeff Mihelich, Manager, City of Bozeman, P.O. Box 1230, Bozeman, MT 59771.                                                      | Alfred M. Stiff Building, 20 East Olive Street, 1st Floor, Bozeman, MT 59715.                                                          | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Mar. 1, 2021 .....   | 300028        |
| Pennsylvania: Lackawanna. | City of Scranton (20–03–0798P).                        | The Honorable Paige G. Cognetti, Mayor, City of Scranton, 340 North Washington Avenue, Scranton, PA 18503.                          | Planning Department, 340 North Washington Avenue, Scranton, PA 18503.                                                                  | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 420538        |
| Texas: Atascosa .....     | Unincorporated areas of Atascosa County (20–06–2205P). | The Honorable Robert L. Hurley, Atascosa County Judge, 1 Courthouse Circle Drive, Suite 206, Jourdan, TX 78026.                     | Atascosa County Courthouse, 1 Courthouse Circle Drive, Jourdan, TX 78026.                                                              | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 4, 2021 .....   | 480014        |
| Bexar .....               | City of San Antonio (19–06–1446P).                     | The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.                                    | Transportation and Capital Improvements Department, Stormwater Division, 114 West Commerce, 7th Floor, San Antonio, TX 78205.          | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 1, 2021 .....   | 480045        |

| State and county | Location and case No.                                 | Chief executive officer of community                                                                                | Community map repository                                                                                                      | Online location of letter of map revision                                                           | Date of modification | Community No. |
|------------------|-------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|----------------------|---------------|
| Bexar .....      | City of San Antonio (19-06-3670P).                    | The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.                    | Transportation and Capital Improvements Department, Stormwater Division, 114 West Commerce, 7th Floor, San Antonio, TX 78205. | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Jan. 25, 2021 ....   | 480045        |
| Collin .....     | City of McKinney (20-06-1287P).                       | The Honorable George Fuller, Mayor, City of McKinney, P.O. Box 517, McKinney, TX 75070.                             | Engineering Department, 221 North Tennessee Street, McKinney, TX 75069.                                                       | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Mar. 1, 2021 .....   | 480135        |
| Dallas .....     | City of Dallas (20-06-0418P).                         | The Honorable Eric Johnson, Mayor, City of Dallas, 1500 Marilla Street, Suite 5EN, Dallas, TX 75201.                | Floodplain Management Department, 320 East Jefferson Boulevard, Suite 307, Dallas, TX 75203.                                  | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 1, 2021 .....   | 480171        |
| Dallas .....     | City of Dallas (20-06-1125P).                         | The Honorable Eric Johnson, Mayor, City of Dallas, 1500 Marilla Street, Suite 5EN, Dallas, TX 75201.                | Floodplain Management Department, 320 East Jefferson Boulevard, Suite 307, Dallas, TX 75203.                                  | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 1, 2021 .....   | 480171        |
| Dallas .....     | City of Farmers Branch (20-06-1125P).                 | The Honorable Robert C. Dye, Mayor, City of Farmers Branch, 13000 William Dodson Parkway, Farmers Branch, TX 75234. | City Hall, 13000 William Dodson Parkway, Farmers Branch, TX 75234.                                                            | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 1, 2021 .....   | 480174        |
| Denton .....     | City of Justin (20-06-1792P).                         | The Honorable Alan Woodall, Mayor, City of Justin, P.O. Box 129, Justin, TX 76247.                                  | Planning and Zoning Department, 415 North College Avenue, Justin, TX 76247.                                                   | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 480778        |
| Guadalupe ...    | City of Cibolo (20-06-0816P).                         | Mr. Robert T. Herrera, Manager, City of Cibolo, 200 South Main Street, Cibolo, TX 78108.                            | Geographic Information Systems (GIS) Department, 200 South Main Street, Cibolo, TX 78108.                                     | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Mar. 4, 2021 .....   | 480267        |
| Hays .....       | Unincorporated areas of Hays County (20-06-1997P).    | The Honorable Ruben Becerra, Hays County Judge, 111 East San Antonio Street, Suite 300, San Marcos, TX 78666.       | Hays County Development Services Department, 2171 Yarrington Road, Kyle, TX 78640.                                            | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Mar. 11, 2021 ....   | 480321        |
| Kaufman .....    | City of Crandall (20-06-2061P).                       | The Honorable Danny Kirbie, Mayor, City of Crandall, 110 South Main Street, Crandall, TX 75114.                     | City Hall, 110 South Main Street, Crandall, TX 75114.                                                                         | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 19, 2021 ....   | 480409        |
| Kaufman .....    | Unincorporated areas of Kaufman County (20-06-2061P). | The Honorable Hal Richards, Kaufman County Judge, 100 West Mulberry Street, Kaufman, TX 75142.                      | Kaufman County Courthouse, 106 West Grove Street, Kaufman, TX 75142.                                                          | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 19, 2021 ....   | 480411        |
| Randall .....    | Unincorporated areas of Randall County (20-06-2051P). | The Honorable Ernie Houdashell, Randall County Judge, 501 16th Street, Suite 303, Canyon, TX 79015.                 | Randall County Road and Bridge Department, 301 West Highway 60, Canyon, TX 79015.                                             | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 19, 2021 ....   | 480532        |
| Tarrant .....    | City of Benbrook (20-06-0768P).                       | The Honorable Jerry Dittrich, Mayor, City of Benbrook, 911 Winscott Road, Benbrook, TX 76126.                       | City Hall, 911 Winscott Road, Benbrook, TX 76126.                                                                             | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 480586        |
| Tarrant .....    | City of Crowley (20-06-1367P).                        | The Honorable Billy P. Davis, Mayor, City of Crowley, 201 East Main Street, Crowley, TX 76036.                      | City Hall, 201 East Main Street, Crowley, TX 76036.                                                                           | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 1, 2021 .....   | 480591        |
| Tarrant .....    | City of Fort Worth (20-06-0768P).                     | The Honorable Betsy Price, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.                       | Transportation and Public Works Department, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.                        | <a href="https://msc.fema.gov/portal/advanceSearch">https://msc.fema.gov/portal/advanceSearch</a> . | Feb. 16, 2021 ....   | 480596        |

**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency**

[Docket ID FEMA-2020-0002; Internal Agency Docket No. FEMA-B-2069]

**Proposed Flood Hazard Determinations****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

**SUMMARY:** Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

**DATES:** Comments are to be submitted on or before March 1, 2021.

**ADDRESSES:** The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://www.fema.gov/preliminaryfloodhazarddata> and the respective

Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2069, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacibit@fema.dhs.gov](mailto:patrick.sacibit@fema.dhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacibit@fema.dhs.gov](mailto:patrick.sacibit@fema.dhs.gov); or visit the FEMA Mapping and Insurance eXchange (FMIX) online at [https://www.floodmaps.fema.gov/fhm/fmx\\_main.html](https://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are

provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at [https://www.floodsrp.org/pdfs/srp\\_overview.pdf](https://www.floodsrp.org/pdfs/srp_overview.pdf).

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://www.fema.gov/preliminaryfloodhazarddata> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

**Michael M. Grimm,**  
Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

| Community                                                                      | Community map repository address                                                                          |
|--------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|
| <b>Jefferson County, Alabama and Incorporated Areas</b>                        |                                                                                                           |
| <b>Project: 18-04-0027S Preliminary Date: May 8, 2019 and December 6, 2019</b> |                                                                                                           |
| City of Bessemer .....                                                         | City Hall, 1700 3rd Avenue North, Bessemer, AL 35020.                                                     |
| City of Birmingham .....                                                       | Department of Planning, Engineering, and Permits, 710 North 20th Street, 5th Floor, Birmingham, AL 35203. |
| City of Fairfield .....                                                        | City Hall, 4701 Gary Avenue, Fairfield, AL 35064.                                                         |
| City of Hueytown .....                                                         | Building and Zoning Department, 1318 Hueytown Road, Hueytown, AL 35023.                                   |
| City of Lipscomb .....                                                         | Lipscomb City Hall, 5512 Avenue H, Bessemer, AL 35020.                                                    |

| Community                                                                                                                            | Community map repository address                                                                                     |
|--------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|
| City of Pleasant Grove .....                                                                                                         | City Hall, 501 Park Road, Pleasant Grove, AL 35127.                                                                  |
| Town of North Johns .....                                                                                                            | North Johns Town Hall, 4411 Town Hall Drive, Adger, AL 35006.                                                        |
| Unincorporated Areas of Jefferson County .....                                                                                       | Jefferson County Land Development Office, 716 Richard Arrington Jr. Boulevard North, Room 260, Birmingham, AL 35203. |
| <b>Tuscaloosa County, Alabama and Incorporated Areas</b><br><b>Project: 18-04-0027S Preliminary Date: May 8, 2019</b>                |                                                                                                                      |
| City of Northport .....                                                                                                              | City Hall, 3500 McFarland Boulevard, Northport, AL 35476.                                                            |
| City of Tuscaloosa .....                                                                                                             | City Hall, 2201 University Boulevard, Tuscaloosa, AL 35401.                                                          |
| Town of Brookwood .....                                                                                                              | Town Hall, 15689 Alabama Highway 216, Brookwood, AL 35444.                                                           |
| Town of Coaling .....                                                                                                                | Town Hall, 11281 Stephens Loop Road, Coaling, AL 35453.                                                              |
| Town of Coker .....                                                                                                                  | Town Hall, 11549 Eisenhower Drive, Coker, AL 35452.                                                                  |
| Town of Lake View .....                                                                                                              | Town Hall, 22757 Central Park Drive, Lake View, AL 35111.                                                            |
| Town of Vance .....                                                                                                                  | Town Hall, 17710 Vance Municipal Drive, Vance, AL 35490.                                                             |
| Town of Woodstock .....                                                                                                              | Town Hall, 28513 Alabama Highway 5, Woodstock, AL 35188.                                                             |
| Unincorporated Areas of Tuscaloosa County .....                                                                                      | Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.                                   |
| <b>Walker County, Alabama and Incorporated Areas</b><br><b>Project: 18-04-0027S Preliminary Date: May 8, 2019</b>                    |                                                                                                                      |
| Unincorporated Areas of Walker County .....                                                                                          | Walker County Engineering Department, 6 Ellis Haynes Drive, Jasper, AL 35503.                                        |
| <b>Greene County, Arkansas and Incorporated Areas</b><br><b>Project: 15-06-0133S Preliminary Date: June 30, 2020</b>                 |                                                                                                                      |
| Unincorporated Areas of Greene County .....                                                                                          | Greene County Office of Emergency Management, 320 West Court Street, Suite 107, Paragould, AR 72450.                 |
| <b>Boulder County, Colorado and Incorporated Areas</b><br><b>Project: 19-08-0003S Preliminary Date: September 30, 2019</b>           |                                                                                                                      |
| City of Boulder .....                                                                                                                | Park Central, 1739 Broadway, Boulder, CO 80302.                                                                      |
| City of Longmont .....                                                                                                               | Development Services Center, 385 Kimbark Street, Longmont, CO 80501.                                                 |
| Town of Erie .....                                                                                                                   | Town Hall, 645 Holbrook Street, Erie, CO 80516.                                                                      |
| Town of Jamestown .....                                                                                                              | Town Hall, 118 Main Street, Jamestown, CO 80455.                                                                     |
| Town of Lyons .....                                                                                                                  | Town Hall, 432 5th Avenue, Lyons, CO 80540.                                                                          |
| Town of Nederland .....                                                                                                              | Town Hall, 45 West 1st Street, Nederland, CO 80466.                                                                  |
| Town of Superior .....                                                                                                               | Town Hall, 124 East Coal Creek Drive, Superior, CO 80027.                                                            |
| Town of Ward .....                                                                                                                   | Town Hall, 1 Columbia Street, Ward, CO 80481.                                                                        |
| Unincorporated Areas of Boulder County .....                                                                                         | Boulder County Community Planning and Permitting Department, 2045 13th Street, Boulder, CO 80302.                    |
| <b>Sumter County, South Carolina and Incorporated Areas</b><br><b>Project: 18-04-0010S Preliminary Date: January 17, 2020</b>        |                                                                                                                      |
| City of Sumter .....                                                                                                                 | Magnolia Place, 20 North Magnolia Street, Sumter, SC 29150.                                                          |
| Town of Mayesville .....                                                                                                             | Town Hall, 22 South Main Street, Mayesville, SC 29104.                                                               |
| Unincorporated Areas of Sumter County .....                                                                                          | Magnolia Place, 20 North Magnolia Street, Sumter, SC 29150.                                                          |
| <b>Williamsburg County, South Carolina and Incorporated Areas</b><br><b>Project: 18-04-0010S Preliminary Date: January 17, 2020</b>  |                                                                                                                      |
| Town of Kingstree .....                                                                                                              | Town Hall, 401 North Longstreet Street, Kingstree, SC 29556.                                                         |
| Unincorporated Areas of Williamsburg County .....                                                                                    | Williamsburg County Public Service Administration Building, 201 West Main Street, Kingstree, SC 29556.               |
| <b>Davidson County, Tennessee and Incorporated Areas</b><br><b>Project: 18-04-0037S Preliminary Date: March 27, 2020</b>             |                                                                                                                      |
| City of Forest Hills .....                                                                                                           | Forest Hills City Hall, 6300 Hillsboro Pike, Nashville, TN 37215.                                                    |
| City of Goodlettsville .....                                                                                                         | Community Development Building, 318 North Main Street, Goodlettsville, TN 37072.                                     |
| Metropolitan Government of Nashville-Davidson County .....                                                                           | Metro Water and Sewage Service, 1600 Second Avenue North, Nashville, TN 37208.                                       |
| <b>Nueces County, Texas and Incorporated Areas</b><br><b>Project: 05-06-A088S Preliminary Date: May 30, 2018 and August 13, 2020</b> |                                                                                                                      |
| City of Bishop .....                                                                                                                 | City Hall, 203 East Main Street, Bishop, TX 78343.                                                                   |
| City of Corpus Christi .....                                                                                                         | Development Services, 2406 Leopard Street, Corpus Christi, TX 78408.                                                 |



| Community                                                                                                                 | Community map repository address                                        |
|---------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|
| City of Robstown .....                                                                                                    | Code Enforcement Division, 101 East Main Street, Robstown, TX 78380.    |
| Unincorporated Areas of Nueces County .....                                                                               | Nueces County Courthouse, 901 Leopard Street, Corpus Christi, TX 78401. |
| <b>Monroe County, West Virginia and Incorporated Areas</b><br><b>Project: 19-03-0002S Preliminary Date: April 9, 2020</b> |                                                                         |
| Town of Alderson .....                                                                                                    | Monroe County 911 Center, 39 Nota Street, Union, WV 24983.              |
| Unincorporated Areas of Monroe County .....                                                                               | Monroe County 911 Center, 39 Nota Street, Union, WV 24983.              |

[FR Doc. 2020-26485 Filed 11-30-20; 8:45 am]

BILLING CODE 9110-12-P

**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency**

[Docket ID FEMA-2020-0002; Internal Agency Docket No. FEMA-B-2072]

**Proposed Flood Hazard Determinations****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

**SUMMARY:** Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

**DATES:** Comments are to be submitted on or before March 1, 2021.

**ADDRESSES:** The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://www.fema.gov/preliminaryfloodhazarddata> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2072, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacbibit@fema.dhs.gov](mailto:patrick.sacbibit@fema.dhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) [patrick.sacbibit@fema.dhs.gov](mailto:patrick.sacbibit@fema.dhs.gov); or visit the FEMA Mapping and Insurance eXchange (FMIX) online at [https://www.floodmaps.fema.gov/fhm/fmx\\_main.html](https://www.floodmaps.fema.gov/fhm/fmx_main.html).

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain

management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at [https://www.floodsrp.org/pdfs/srp\\_overview.pdf](https://www.floodsrp.org/pdfs/srp_overview.pdf).

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://www.fema.gov/preliminaryfloodhazarddata> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service

Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

**Michael M. Grimm,**  
Assistant Administrator for Risk  
Management, Department of Homeland  
Security, Federal Emergency Management  
Agency.

| Community                                                                                                                    | Community map repository address                                             |
|------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|
| <b>Craighead County, Arkansas and Incorporated Areas</b><br><b>Project: 18-06-0001S Preliminary Date: June 30, 2020</b>      |                                                                              |
| City of Bay .....                                                                                                            | City Hall, 220 Elder Street, Bay, AR 72411.                                  |
| City of Bono .....                                                                                                           | City Hall, 241 East College Street, Bono, AR 72416.                          |
| City of Brookland .....                                                                                                      | City Hall, 613 Holman, Brookland, AR 72417.                                  |
| City of Caraway .....                                                                                                        | City Hall, 102 East State Street, Caraway, AR 72419.                         |
| City of Cash .....                                                                                                           | City Hall, 4391 Highway 18, Cash, AR 72421.                                  |
| City of Jonesboro .....                                                                                                      | City Hall, 300 South Church Street, Jonesboro, AR 72401.                     |
| City of Lake City .....                                                                                                      | City Hall, 406 Court Street, Lake City, AR 72437.                            |
| City of Monette .....                                                                                                        | City Hall, 1 Drew Avenue, Monette, AR 72447.                                 |
| Town of Egypt .....                                                                                                          | Town Hall, 11063 Highway 91, Egypt, AR 72427.                                |
| Unincorporated Areas of Craighead County .....                                                                               | Craighead County Annex, 511 Union, Room 119, Jonesboro, AR 72401.            |
| <b>Hyde County, North Carolina and Incorporated Areas</b><br><b>Project: 11-04-0730S Preliminary Date: November 30, 2018</b> |                                                                              |
| Unincorporated Areas of Hyde County .....                                                                                    | Hyde County Government Center, 30 Oyster Creek Road, Swan Quarter, NC 27885. |

[FR Doc. 2020-26481 Filed 11-30-20; 8:45 am]

BILLING CODE 9110-12-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS-R3-ES-2020-0136;  
FXES11140300000-201]

#### **Draft Environmental Assessment and Proposed Habitat Conservation Plan; Receipt of an Application for an Incidental Take Permit, High Prairie Wind Energy Facility, Schuyler and Adair Counties, Missouri**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comment and information.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have received an application from TG High Prairie, LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act (ESA), for its High Prairie Wind Energy Facility. If approved, the ITP would be for a 6-year period and would authorize the incidental take of covered species, including the endangered Indiana bat, threatened northern long-eared bat, and the little brown bat, currently under discretionary review. While the ITP is for 6 years, the wind energy project is scheduled to be operational for thirty years and intensive monitoring

conducted during this permit term will inform the need for future avoidance or a new long-term ITP that will comply with a new NEPA analysis and habitat conservation plan (HCP). The applicant has prepared a HCP that describes the actions and measures that the applicant would implement to avoid, minimize, and mitigate incidental take of the covered species for the first 6 years. We also announce the availability of a draft environmental assessment, which has been prepared in response to the permit application in accordance with the requirements of the National Environmental Policy Act (NEPA). We request public comment on the application, which includes the applicant's proposed HCP, the Service's draft environmental assessment, prepared pursuant to NEPA and associated documents. We provide this notice to seek review and comment from the public and Federal, Tribal, State and local governments.

**DATES:** We will accept comments received or postmarked on or before December 31, 2020.

#### **ADDRESSES:**

*Document availability:* Electronic copies of the documents this notice announces, as well as public comments we receive, will be available online in Docket No. FWS-R3-ES-2020-0136 at <http://www.regulations.gov>.

*Comment submission:* In your comment, please specify whether your comment addresses the proposed HCP,

draft EA, or any combination of the aforementioned documents, or other supporting documents. You may submit written comments by one of the following methods:

- *Online:* <http://www.regulations.gov>. Search for and submit comments on Docket No. FWS-R3-ES-2020-0136.

- *By hard copy:* Submit comments by U.S. mail to Public Comments Processing, Attn: Docket No. FWS-R3-ES-2020-0136; U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB/3W; Falls Church, VA 22041-3803.

#### **FOR FURTHER INFORMATION CONTACT:**

Karen Herrington, Field Supervisor, Columbia Missouri Ecological Services Field Office, U.S. Fish and Wildlife Service, 101 Park DeVille Drive, Suite A, Columbia, MO 65203; telephone: 573-234-2132.

Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1-800-877-8339 for TTY assistance.

**SUPPLEMENTARY INFORMATION:** We, the U.S. Fish and Wildlife Service (Service), have received an application from TG High Prairie LLC (applicant) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), for its High Prairie Wind Energy facility (facility). The facility is located in

Schuyler and Adair Counties, Missouri, and consists of 163 2.2-megawatt (MW) turbines and 12 3.45-MW turbines. If approved, the ITP would be for a 6-year period and would authorize the incidental take of covered species, including the federally endangered Indiana bat, federally threatened northern long-eared bat, and the little brown bat (LBB), currently under discretionary review. The little brown bat is not federally protected, but is currently being evaluated for protection under the ESA. The applicant has chosen to include the LBB as a covered species, and as such, it will be treated as if it were currently listed under the ESA. The ITP, if issued, would authorize incidental take of the covered species that may occur as a result of the operation of 175 wind turbines over a six-year period. The applicant has prepared a habitat conservation plan (HCP) that describes the actions and measures that the applicant would implement to avoid, minimize, and mitigate incidental take of the covered species. We also announce the availability of a draft environmental assessment (DEA), which has been prepared in response to the permit application in accordance with the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We request public comment on the application and associated documents.

### Background

Section 9 of the ESA and its implementing regulations prohibit the “take” of animal species listed as endangered or threatened. Take is defined under the ESA as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [listed animal species,] or to attempt to engage in any such conduct” (16 U.S.C. 1532). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. “Incidental take” is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity (16 U.S.C. 1539). Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

### Applicant's Proposed Project

The applicant requests a 6-year ITP for turbine operations that will result in take of the federally endangered Indiana bat, federally threatened northern long-eared bat, and the little brown bat (covered species). The applicant determined that take is reasonably

certain to occur incidental to operation of 175 previously constructed wind turbines in Schuyler and Adair Counties, Missouri, consisting of approximately 113,873 acres of private land. The proposed conservation strategy in the applicant's proposed HCP is designed to avoid, minimize, and mitigate the impacts of the covered activity on the covered species. The biological goals and objectives are to minimize potential take of covered species through onsite minimization measures and to provide habitat conservation measures to offset any impacts from operations of the project. The High Prairie Wind site includes multiple confirmed summer maternity roosts or colonies for the covered species and is more than 65 miles from the Sodalis Nature Preserve (largest known Indiana bat hibernaculum). The HCP provides onsite avoidance and minimization measures, which include turbine operational adjustments. The estimated level of take from the project is 72 Indiana bats, 96 little brown bats, and 18 northern long-eared bats over the 6-year permit term. To offset the impacts of the taking of covered species, the applicant proposes to protect 211.1 acres of known maternity colony habitat, in perpetuity, through the Service-approved Chariton Hills Conservation Bank located in Adair and Schuyler Counties.

### National Environmental Policy Act

The issuance of an ITP is a Federal action that triggers the need for compliance with NEPA. We prepared a draft EA that analyzes the environmental impacts on the human environment resulting from three alternatives: A no-action alternative, the applicant's proposed action, and a more restrictive alternative consisting of feathering turbines at a rate of wind speed that results in less impacts to bats.

### Next Steps

The Service will evaluate the permit application and the comments received to determine whether the application meets the requirements of section 10(a) of the ESA. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the above findings, we will determine whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue the requested ITP to the applicant.

### Request for Public Comments

The Service invites comments and suggestions from all interested parties

on the proposed HCP, draft EA and supporting documents during a 30-day public comment period (see **DATES**). In particular, information and comments regarding the following topics are requested:

1. Whether adaptive management, monitoring and mitigation provisions in the Proposed Action alternative are sufficient;
2. Any threats to the Indiana bat, the northern long-eared bat and the little brown bat that may influence their populations over the life of the ITP that are not addressed in the proposed HCP or draft EA;
3. Any new information on white-nose syndrome effects on the Indiana bat, the northern long-eared bat and the little brown bat;
4. Any information that could help inform future operating parameters to avoid impacts to listed bats (beyond ceasing operations at night). A specific data set that would be useful would be one correlating all bat activity to temperature and weather parameters;
5. Any new information about colony grouping and the timing in which bats leave their summer areas (to further refine maternity colony adaptive management strategy dates);
6. Any specific parameters or suggestions to further refine population models (in the EA);
7. Whether or not the significance of the impact on various aspects of the human environment has been adequately analyzed; and
8. Any other information pertinent to evaluating the effects of the proposed action on the human environment, including those on the Indiana bat, the northern long-eared bat and the little brown bat.

Because this permit application was sufficiently complete prior to the effective date of the new NEPA regulations, we are exercising our discretion to conduct our NEPA analysis under the regulations in effect prior to September 14, 2020.

### Availability of Public Comments

You may submit comments by one of the methods shown under **ADDRESSES**. We will post on <http://regulations.gov> all public comments and information received electronically or via hardcopy. All comments received, including names and addresses, will become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made

publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

#### Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22) and the NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1506.6 (2019); 43 CFR part 46).

**Lori Nordstrom,**

*Assistant Regional Director, Ecological Services.*

[FR Doc. 2020-26520 Filed 11-30-20; 8:45 am]

**BILLING CODE 4333-15-P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Cloud-Connected Wood-Pellet Grills and Components Thereof, DN 3510*; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov).

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's

Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Traeger Pellet Grills LLC on November 25, 2020. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cloud-connected wood-pellet grills and components thereof. The complaint names as respondent: GMG Products LLC of Lakeside, OR. The complainant requests that the Commission issue a limited exclusion order and cease and desist order, and impose a bond upon respondent alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number ("Docket No. 3510") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures<sup>1</sup>). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for

<sup>1</sup> Handbook for Electronic Filing Procedures: [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf).

developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (iii) by U.S. government employees and contract personnel,<sup>2</sup> solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.<sup>3</sup>

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: November 25, 2020.

**Katherine Hiner,**

*Supervisory Attorney.*

[FR Doc. 2020-26509 Filed 11-30-20; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1232]

### Certain Chocolate Milk Powder and Packaging Thereof; Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 29, 2020, under section 337 of the Tariff Act of 1930, as amended, on behalf of Meenaxi Enterprise Inc. of Edison, New Jersey. A supplement was filed on November 10, 2020. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain chocolate milk powder and packaging thereof by reason of infringement of U.S. Trademark Registration No. 4,206,026 ("the '026 trademark"). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a general exclusion order and cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Pathenia M. Proctor, The Office of Unfair Import Investigation, U.S. International Trade Commission, telephone (202) 205-2560.

#### SUPPLEMENTARY INFORMATION:

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2020).

**Scope of Investigation:** Having considered the complaint, the U.S. International Trade Commission, on November 24, 2020, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(C) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of the '026 trademark; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is "chocolate milk powder in consumer-sized container with the Bournvita label";

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Meenaxi Enterprise Inc., 86-88 Executive Ave., Edison, NJ 08817.

(b) The respondents are the following entities alleged to be in violation of

section 337, and are the parties upon which the complaint is to be served:

Bharat Bazar Inc., 34301 Alvarado Niled Road, Union City, CA 94086

Madras Group Inc. d/b/a Madras

Groceries, 1177 West El Camino Real, Sunnyvale, CA 94087

Coconut Hill Inc. d/b/a Coconut Hill, 554 Murphy Ave., Sunnyvale, CA 94086

Organic Food Inc. d/b/a Namaste Plaza Indian Super Market, 3269 Walnut Ave., Fremont, CA 94538

India Cash & Carry Inc. d/b/a India Cash & Carry, 1032 E. El Camino Real, Sunnyvale, CA 94087

New India Bazar Inc. d/b/a New India Bazar, 2368 Bentley Ridge Dr, San Jose, CA 94538

Aapka Big Bazar, 831-833 Newark Avenue, Jersey City, NJ 07306

Siya Cash & Carry Inc. d/b/a Siya Cash & Carry, 832 Newark Avenue, Jersey City, NJ 07306

JFK Indian Grocery LLC d/b/a D-Mart Super Market, 3000 Kennedy Blvd., Jersey City, NJ 07306

Trinethra Indian Super Markets, 39207 Cedar Blvd., Newark, CA 94560

Apna Bazar Cash & Carry Inc. d/b/a Apna Bazar Cash & Carry, 1700 Oak Tree Road, Edison, NJ 08820

Subzi Mandi Cash & Carry Inc. d/b/a Subzi Mandi Cash & Carry, 1347 Stelton Road, Piscataway, NJ 08854  
Subhlaxmi Grocers, 550 Stelton Road, Piscataway, NJ 08854

Patidar Cash & Carry Inc. d/b/a Patidar Cash & Carry, 128 Durham Ave., South Plainfield, NJ 07080

Keemat Grocers, 3311 Highway 6 S, Sugarland, TX 77478

KGF World Food Warehouse Inc. d/b/a World Food Mart, 14625 Beechnut St., Houston, TX 77083

Telfair Spices, 1219 Museum Square Dr., Suite 100, Sugarland, TX 77479

Indian Groceries and Spices Inc. d/b/a iShoplndia.com, 10701 W. North Avenue, Suite 100, Milwaukee, WI 53226

Rani Foods LP d/b/a Rani's World Foods, 16721 Hollister Street, Suite Q, Houston, TX 77066

Tathastu Trading LLC, 100 Ryan St. Ste 21, South Plainfield, NJ 07080

Choice Trading LLC, 7000 Kennedy Blvd. East, Guttenberg, NJ 07093

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be

<sup>2</sup> All contract personnel will sign appropriate nondisclosure agreements.

<sup>3</sup> Electronic Document Information System (EDIS): <https://edis.usitc.gov>.

submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: November 25, 2020.

**Katherine Hiner,**  
Supervisory Attorney.

[FR Doc. 2020-26468 Filed 11-30-20; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1204]

### Certain Chemical Mechanical Planarization Slurries and Components Thereof; Notice of a Commission Determination Not to Review an Initial Determination Granting Complainant's Motion To Amend the Complaint and the Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 8) of the presiding administrative law judge ("ALJ") granting complainant's motion to amend the complaint and the notice of investigation to correct the name of the complainant.

**FOR FURTHER INFORMATION CONTACT:** Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** On July 7, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337"), based on a complaint filed by Cabot Microelectronics Corporation of Aurora, Illinois ("Cabot"). 85 FR 40685-86 (Jul. 7, 2020). The complaint alleges a violation of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain chemical mechanical planarization slurries and components thereof by reason of infringement of one or more claims of U.S. Patent No. 9,499,721 ("the '721 patent"). The complaint also alleges the existence of a domestic industry. The notice of investigation names as respondents DuPont de Nemours, Inc. of Wilmington, Delaware; Rohm and Haas Electronic Materials CMP Inc. of Newark, Delaware; Rohm and Haas Electronic Materials CMP Asia Inc. (d/b/a Rohm and Haas Electronic Materials CMP Asia Inc., Taiwan Branch (U.S.A.)) of Taoyuan City, Taiwan; Rohm and Haas Electronic Materials Asia-Pacific Co., Ltd. of Miaoli, Taiwan; Rohm and Haas Electronic Materials K.K. of Tokyo, Japan; and Rohm and Haas Electronic Materials LLC of Marlborough, Massachusetts. *Id.* at 40686. The Commission's Office of Unfair Import Investigations is also named as a party in this investigation. *Id.* Subsequently, the Commission amended the complaint and the notice of investigation to assert infringement of additional claims of the '721 patent. Order No. 7 (Oct. 1, 2020), *unreviewed* by Notice (Oct. 19, 2020). See 85 FR 67371-72 (Oct. 22, 2020).

On October 7, 2020, pursuant to 19 CFR 210.14(b)(1), Cabot filed a motion for leave to "amend the Complaint and the Notice of Institution of Investigation

('NOI') to change the name of Complainant from Cabot Microelectronics Corporation to CMC Materials, Inc." Mot. at 1. The motion states that "[a]ll other parties stated that they will not oppose this Motion." *Id.* No response was filed.

On November 10, 2020, the ALJ issued the subject ID (Order No. 8) granting complainant's motion. The ID finds that, based on the review of the evidence, good cause exists to change the name of the complainant from Cabot Microelectronics Corporation to CMC Materials, Inc. ID at 2. The ID further finds that this amendment would not prejudice the public interest or the rights of the parties to the investigation. *Id.* No party petitioned for review of the ID.

The Commission has determined not to review the subject ID.

The Commission vote for this determination took place on November 24, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: November 24, 2020.

**William Bishop,**  
Supervisory Hearings and Information Officer.

[FR Doc. 2020-26398 Filed 11-30-20; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1231]

### Certain Digital Imaging Devices and Products Containing the Same and Components Thereof Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on September 25, 2020, under section 337 of the Tariff Act of 1930, as amended, on behalf of Pictos Technologies, Inc. of San Jose, California. An amended complaint was filed on October 23, 2020, and supplemented on November 13, 2020 and November 16, 2020. The complaint, as amended, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within

the United States after importation of certain digital imaging devices and products containing the same and components thereof by reason of infringement of certain claims of U.S. Patent No. 6,838,651 (“the ‘651 patent”); U.S. Patent No. 7,800,145 (“the ‘145 patent”); U.S. Patent No. 7,064,768 (“the ‘768 patent”); and U.S. Patent No. 7,323,671 (“the ‘671 patent”); and that an industry in the United States exists as required by the applicable Federal Statute. The amended complaint further alleges violations of section 337 based upon the importation into the United States, or in the sale of certain digital imaging devices and products containing the same and components thereof by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

**ADDRESSES:** The amended complaint, except for any confidential information contained therein, may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

**FOR FURTHER INFORMATION CONTACT:** Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

**SUPPLEMENTARY INFORMATION:**

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10 (2020).

**Scope of Investigation:** Having considered the amended complaint, the U.S. International Trade Commission, on November 24, 2020, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:

(a) Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claim 1–12 and 18 of the ‘651 patent; claims 1 and 12 of the ‘145 patent; claims 1, 2, 8, and 13 of the ‘768 patent; and claims 1–26 of the ‘671 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(b) whether there is a violation of subsection (a)(1)(A) of section 337 in the importation, or in the sale of certain products identified in paragraph (2) by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States;

(2) Pursuant to section 210.10(b)(1) of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is “digital imaging sensors and mobile phone handsets, tablet computers, laptop computers, web cameras, home monitoring cameras, and digital cameras that contain those sensors”;

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Pictos Technologies, Inc, 109 Bonaventura Drive, San Jose CA 95134.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the amended complaint is to be served:

Samsung Electronics Co., Ltd., 129 Samseong-Ro, Yeongtong-Gu, Suwon, Gyeonggi 16677, Republic of Korea  
 Samsung Electronics America, Inc., 85 Challenger Rd., Ridgefield Park, NJ 07660–2118  
 Samsung Semiconductor, Inc., 3655 North First Street, San Jose, CA 95134–1713

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the amended complaint and the notice of investigation must be submitted by the named respondents in

accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the amended complaint and the notice of investigation. Extensions of time for submitting responses to the amended complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the amended complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: November 25, 2020.

**Katherine Hiner,**  
*Supervisory Attorney.*

[FR Doc. 2020–26467 Filed 11–30–20; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1216]

### Certain Vacuum Insulated Flasks and Components Thereof; Notice of a Commission Determination Not To Review an Initial Determination Granting Complainants’ Motion To Amend the Complaint and the Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (“ID”) (Order No. 12) of the presiding chief administrative law judge (“CALJ”) granting complainants’ motion to amend the complaint and the notice of investigation.

**FOR FURTHER INFORMATION CONTACT:** Michael Liberman, Esq., Office of the General Counsel, U.S. International



Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** On September 3, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by Steel Technology LLC d/b/a Hydro Flask and Helen of Troy Limited (collectively, “Complainants”). 85 FR 55030–31 (Sep. 3, 2020). The complaint alleges a violation of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain vacuum insulated flasks and components thereof by reason of infringement of: (1) The sole claim of U.S. Design Patent Nos. D806,468; D786,012 (“the ‘012 patent”); and D799,320; and (2) U.S. Trademark Registration Nos. 4,055,784; 5,295,365; 5,176,888; and 4,806,282. The complaint also alleges the existence of a domestic industry. The notice of investigation names the following as respondents: Everich and Tomic Houseware Co., Ltd. of Hangzhou, China (“Everich”); Cangnan Kaiyisi E-Commerce Technology Co., Ltd. of Wenzhou, Zhejiang, China; Shenzhen Huichengyuan Technology Co., Ltd. of Shenzhen, Guangdong, China; Sinbada Impex Co., Ltd. of Hefei, Anhui, China; Yongkang Huiyun Commodity Co., Ltd. of Jinhua, Zhejiang, China; Wuyi Loncin Bottle Co., Limited of Jinhua, Zhejiang, China; Yiwu Honglu Daily Necessities Co., Ltd. of Yiwu City, Zhejiang, China; Zhejiang Yuchuan Industry & Trade Co., Ltd. of Jinhua, Zhejiang, China; Zhejiang Yongkang Unique Industry & Trade Co., Ltd. of Jinhua, Zhejiang, China; Suzhou Prime Gifts Co., Ltd. of Suzhou, Jiangsu, China; Hangzhou Yuehua Technology Co., Ltd. of Hangzhou, Zhejiang, China; Guangzhou Yawen Technology Co., Ltd. of Guangzhou, China; Yiwu Yiju E-commerce Firm of Yiwu City, Zhejiang Province, China; Jinhua Ruizhi Electronic Commerce Co., Ltd. of Jinhua City, Zhejiang Province, China; Womart

(Tianjin) International Trade Co., Ltd. of Tianjin, China; Shenzhen Yaxin General Machinery Co., Ltd. of Shenzhen, China; Dunhuang Group a.k.a. DHgate of Beijing, China; Eddie Bauer, LLC of Bellevue, Washington; PSEB Holdings, LLC of Wilmington, Delaware; and HydroFlaskPup of Phoenix, Arizona. *Id.* at 55031. The Commission's Office of Unfair Import Investigations (“OUI”) is also named as a party in this investigation. *Id.*

On October 16, 2020, Complainants moved to amend the complaint and notice of investigation to: “(1) assert the ‘012 patent against additional infringing products sold by Everich; (2) incorporate into the complaint the information and additional paragraphs included in Complainants’ Supplemental Letter to the Commission of August 18, 2020; and (3) correct the corporate names of four non-appearing respondents.” Mot. at 1. Specifically, the requested amendment seeks to amend the complaint and notice of investigation to correctly name Yiwu Yiju E-Commerce Firm as “Yiwu Houju E-Commerce Firm,” Jinhua Ruizhi Electronic Commerce Co., Ltd. as “Jinhua City Ruizhi E-Commerce Co., Ltd.,” Womart (Tianjin) International Trade Co., Ltd. as “Wo Ma Te (Tianjin) International Trade Co., Ltd.,” and Shenzhen Yaxin General Machinery Co., Ltd. as “Shenzhen City Yaxin General Machinery Co., Ltd.” *Id.* On October 28, 2020, Everich filed an opposition to the motion with respect to Complainants’ first proposed amendment, but took no position as to the second and third proposed amendments. Opp. at 2. n.1. According to the motion, respondents Eddie Bauer, LLC and Dunhuang Group took no position. Mot. at 3. On October 28, 2020, OUI filed a response in support of the motion.

On November 6, 2020, the CALJ issued the subject ID (Order No. 12) granting Complainants’ motion. Based on the review of the evidence, the ID finds that good cause exists to amend the complaint and the notice of institution of investigation. The ID also finds that amending the complaint and notice of investigation will promote judicial efficiency and is not prejudicial to any party. No party petitioned for review of the ID.

The Commission has determined not to review the subject ID.

The Commission vote for this determination took place on November 24, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of

Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: November 24, 2020.

**William Bishop,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2020–26409 Filed 11–30–20; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0080]

#### Agency Information Collection Activities; Proposed eCollection eComments Requested; Notification of Change of Mailing or Premise Address

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

**ACTION:** 30-Day notice.

**SUMMARY:** The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for an additional 30 days until December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the



information to be collected can be enhanced; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection:* Extension, without change, of a currently approved collection.

(2) *The Title of the Form/Collection:* Notification of Change of Mailing or Premise Address.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: None.

*Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Business or other for-profit.  
*Other:* Individuals or households.

*Abstract:* Per 27 CFR 555.54, licensees and permittees whose mailing address will change, must notify the Chief, Federal Explosives Licensing Center, at least 10 days before the change. ATF personnel will use this information collection to identify the correct location of both explosives licensees/permittees, and the address where their explosive materials are being stored, for purposes of inspection. The collected information will also be used to notify permittees/licensees about any changes in regulation or law that may affect their business activities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 1,000 respondents will utilize this information collection annually, and it will take each respondent approximately 10 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 170 hours, which is equal to 1,000 (# of respondents) \* 0.17 (10 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: November 25, 2020.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2020–26464 Filed 11–30–20; 8:45 am]

**BILLING CODE 4410–14–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Z-Wave Alliance, Inc.

Notice is hereby given that, on November 19, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), Z-Wave Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: Airetec Pte Ltd., Primz Bizhub, SINGAPORE; Black Nova Corp. Limited, Central, HONG KONG; Bridgetek Pte Ltd., Singapore, SINGAPORE; Buffalo Inc., Nagoya, JAPAN; casenio AG, Berlin, GERMANY; ComfortClick d.o.o., Ljubljana, SLOVENIA; Digital Monitoring Products Inc., Springfield, MO; Essence Group (Essence Security International Ltd.), Herzliya, ISRAEL; Fermex Asia Pacific Pte Ltd., Bradell Tech, SINGAPORE; Guangdong Daming Laffey Electric Co., Ltd., Guangdong, PEOPLE’S REPUBLIC OF CHINA; I2G D.O.O., Ljubljana, SLOVENIA; iHomeFuture, Dubai, UNITED ARAB EMIRATES; Insight Energy Ventures LLC d/b/a/Powerley, Royal Oak, MI; IOOTA Srl, Imola, ITALY; ioXt Alliance, Newport Beach, CA; Life2Better, Buenos Aires, ARGENTINA; MCA Systems S.A.S., Barranquilla, COLOMBIA; OpenPath Products, Annapolis, MD; Paxton Access Ltd., Brighton, UNITED KINGDOM; Pyronix Limited, Rotherham, UNITED KINGDOM; Radio Thermostat Company of America, Modesto, CA; Shenzhen iSurpass Technology Co., Ltd., Shenzhen; PEOPLE’S REPUBLIC OF CHINA; Shenzhen Saykey Technology Co., Ltd., Shenzhen, PEOPLE’S REPUBLIC OF CHINA; System and Network Engineering Srl, Roma, ITALY; Tantiv4

Inc., Milpitas, CA; Technicolor Connected Home Rennes, Cesson-Sevigne Cedex, FRANCE; Technicolor Connected Home USA, LLC, Lawrenceville, GA; VOLANSYS Technologies Pvt. Ltd., Santa Clara, CA; Zhejiang TKB Technology Co., Ltd., Yueqing, PEOPLE’S REPUBLIC OF CHINA; ZOME Energy Networks, Inc., Hollis, NH; ABUS KG, Wetter, GERMANY; alfanar Co., Riyadh, SAUDI ARABIA; Askey Computer Group, New Taipei City, TAIWAN; Chuango Security Technology Company Account, Fuzhou, PEOPLE’S REPUBLIC OF CHINA; CHUBU TELECOMMUNICATIONS CO., INC., Nagoya, JAPAN; Connection Technology Systems Inc. (SiMPNiC Brand), New Taipei City, TAIWAN; devolo AG, Aachen, GERMANY; EcoDim, Doetinchem, THE NETHERLANDS; Elektrizitätswerke des Kantons Zürich, Zurich, SWITZERLAND; EUROtronic Technology GmbH, Steinau-Ulmbach, GERMANY; Forest Group Nederland B.V., Deventer, THE NETHERLANDS; Glamo Inc., Tokyo, JAPAN; Hank Electronics LTD., Shenzhen, PEOPLE’S REPUBLIC OF CHINA; HavenLock Inc., Franklin, TN; Hogar Controls Inc., Sterling, VA; HomeControl AS, Oslo, NORWAY; HomeSeer Technologies LLC, Bedford, NH; HORNBACH Baumarkt AG, Bornheim, GERMANY; Hubitat Inc., Scottsdale, AZ; Inovelli LLC, Kalamazoo, MI; IOTAS Inc., Portland, OR; IWATSU ELECTRICAL CO., LTD., Tokyo, JAPAN; KDDI CORPORATION, Tokyo, JAPAN; LinkedGo Technology Co. Ltd., Guangzhou, PEOPLE’S REPUBLIC OF CHINA; MASTER SRL DIVISIONE ELETTRICA, Este, ITALY; Namron AS, Oslo, NORWAY; Nice S.p.A., Oderzo TV, ITALY; Nihon Lock Service Co., Ltd., Tokyo, JAPAN; O2 Czech Republic a.s., Prague, CZECH REPUBLIC; PayLease, LLC DBA Zego, San Diego, CA; Q-light, Kristiansand, NORWAY; ROC-Connect, Inc., Palo Alto, CA; Samjin Co., Ltd., Gyeonggi-do, SOUTH KOREA; Satco Products Inc., Brentwood, NY; Schneider Electric, Andover, MA; Schwaiger GmbH, Langenzenn, GERMANY; Sensurance, San Antonio, TX; Smart Electronic Industrial (Dongguan) Co., Limited, Dongguan City, PEOPLE’S REPUBLIC OF CHINA; Smart Home SA, Gland, SWITZERLAND; SmartThings Inc., Mountain View, CA; Sony Network Communication Inc., Tokyo, JAPAN; Stelpro, QC, CANADA; Tellus Technologies, Varberg, SWEDEN; The Delaney Hardware Co., Cumming, GA; TIM S.p.A. (TELECOM ITALIA),

Milano, ITALY; Toledo & Co., Dorado, PUERTO RICO; Townsteel Inc., City of Industry, CA; Tronico Technology Company Limited, Shatin, HONG KONG; Universal Devices, Inc., Encino, CA; Viva Labs AS, Oslo, NORWAY; Vodafone Group Services GmbH, Dusseldorf, GERMANY; Zooz, Flanders, NJ; ZWaveProducts.com, Inc., Randolph, NJ; Z-Works, Tokyo, JAPAN; ABUS Security Center GmbH & Co. KG, Affing, GERMANY; TONG LUNG METAL INDUSTRY CO., LTD., Chiayi County, TAIWAN; Alarm.com Incorporated, McLean, VA; ASSA ABLOY, New Haven, CT; LEEDARSON, Xiamen, PEOPLE'S REPUBLIC OF CHINA; Qolsys, San Jose, CA; Ring, LLC, Santa Monica, CA; Silicon Laboratories, Inc., Austin, TX; STRATIS IOT, Inc., Philadelphia, PA; 3MANTECH, South Haven, MS; A1 Smarthome Inc., Calgary, CANADA; ACTE A/S, Broendby, DENMARK; Allvy Technology Integrators, LLC, Spring, TX; ARVITECH CONTROLS S.A., Guayaquil, ECUADOR; Automate Asia, Singapore, SINGAPORE; Avant-Garde Technology Ltd., Abuja, NIGERIA; AVX Integrated Technologies, West Nyack, NJ; Aware Care Network, Plano, TX; Base2 Managed It Pty Ltd., New South Wales, AUSTRALIA; Beautmotica, Breda, THE NETHERLANDS; Brittworx, Richmond, CA; B-Smart Integration, St. Leon-Rot, GERMANY; Buo Home SL, Parets Del Valles, SPAIN; Canny Electrics, Victoria, AUSTRALIA; Cassar & Son Industries L.L.C., Austin, TX; CIMA Group, Miami, FL; Comfortica B.V., Enschede, THE NETHERLANDS; Complete Electrical Academy, Clifton, VA; ContractOne, Vail, CO; Custom Smart Automation, New South Wales, AUSTRALIA; D2E Electrical, New South Wales, AUSTRALIA; Domadoo S.A.S., Rillieux La Pape, FRANCE; Domoticalia Smart Home Experience, Madrid, SPAIN; EnLife, Haapsalu, ESTONIA; Farm Automation Australia Pty. Ltd., East Bendigo, AUSTRALIA; Gadget Access Pty Ltd, New South Wales, AUSTRALIA; Go4Panda d.o.o., Novo Mesto, SLOVENIA; GroupSYS Pty Ltd., New South Wales, AUSTRALIA; Gullitech, Savigny sur Orge, FRANCE; Head Enterprises Queensland Pty Ltd., Queensland, AUSTRALIA; i4Things BV, DA Herten, THE NETHERLANDS; idomotique GmbH, Grenchen, Solothurn, SWITZERLAND; Ingenieurburo Hospe, Kelkheim, GERMANY; ION Technologies, Jacksonville, FL; IVEREST EOOD, Plodiv, BULGARIA; JEEDOM SAS, Rillieux La Pape, FRANCE; JV Innovation LLC, East Wakefield, NH;

KEYless Entry Systems, New South Wales, AUSTRALIA; KJ Robotics, Hedehusene, DENMARK; Kohost LLC, Las Vegas, NV; L3 Homeation Pte Ltd., Singapore, SINGAPORE; Lera Smart Home Solutions, New South Wales, AUSTRALIA; LiveSmart Technologies LLC, Anaheim, CA; LivingLab Development Co., Ltd., New Taipei City, TAIWAN; Lynx Integrated Systems, Perth, AUSTRALIA; M Punkt Nu Sverige AB, Linköping, SWEDEN; Mad Rooster Home Protection, Mercer, WI; Miguel Corporate Services Pte Ltd., Midview City, SINGAPORE; Modern Lifestyles Trading Est., Jeddah, SAUDI ARABIA; Modern System Concepts, Inc., Houston, TX; NEDECO Electronics LTD, Nicosia-, CYPRUS; Nemlia sp/f, Torshavn, FAROE ISLANDS; NEON Multimedia Kft., Budapest, HUNGARY; Ohlandt Consulting, Laytonsville, MD; OOT Technologies Ltd., Siofok, HUNGARY; ottosystem GmbH, Darmstadt, GERMANY; picard automation, San Francisco, CA; Plexus Solutions Pty Ltd., Queensland, AUSTRALIA; Rejoin Telematics AB, Orebro, SWEDEN; Resilient Smart Home Communications LLC, Dallas, TX; Rigionn, Singapore, SINGAPORE; Robbshop, Oss, THE NETHERLANDS; Robotix.be, Wezembeek-Oppem, BELGIUM; Security Specialists Ltd., Dunedin, NEW ZEALAND; Sentegrate Pty Ltd., New South Wales, AUSTRALIA; SHINKO SEISAKUSHO CO.,LTD., Chiba, JAPAN; Sky Telecom Ingenieria S.L., Bilbao-Vizcaya, SPAIN; Smart at Home, Pullenvale, AUSTRALIA; Smart Dalton, Riyadh, SAUDI ARABIA; Smart Lifestyle Solutions Pty Ltd., New South Wales, AUSTRALIA; Smart Things Electronics SRL, Ilfov, ROMANIA; SmartEzy Pte Ltd., Singapore, SINGAPORE; Spectrum Smart Solutions LLC, Ajman, UNITED ARAB EMIRATES; Switcher Limited, London, UNITED KINGDOM; Teracom Solutions Pty Ltd., Victoria, AUSTRALIA; There Corporation Oy, Espoo, FINLAND; Tower Automation Pty Ltd., New South Wales, AUSTRALIA; Utilacor PTY LTD., Victoria, AUSTRALIA; Wimonitor s.r.l., Rovereto, ITALY; YATUN s.r.o., Praha, CZECH REPUBLIC; ZNET CO., LTD., Tokyo, JAPAN; Zone-B2B SARL, Saint-Prex, SWITZERLAND; A.KEEMPLECOM LIMITED, Limassol, CYPRUS; Aeotec Limited, Wanchai, HONG KONG; Airzone—Corporacion Empresarial Altra, Malaga, SPAIN; Alfred International Inc., Toronto, CANADA; Alfred Smart Systems, S.L., Barcelona, SPAIN; Alula, St. Paul, MN; AMPER, Pozuelo de Alarcón, Madrid, SPAIN; Animus Home AB, Lund,

SWEDEN; Athom B.V., Enschede, THE NETHERLANDS; Atsumi Electric, Shizuoka, JAPAN; Axis Communications AB, Lund, SWEDEN; BBM Corporation, Tokyo, JAPAN; BLAZE AUTOMATION INC., Princeton, NJ; Boundary Technologies Ltd., Edinburgh, UNITED KINGDOM; Brivo, Bethesda, MD; BRK Brands Inc., Aurora, IL; Clare Controls LLC, Sarasota, FL; Climax Technology Co., Ltd., Taipei City, TAIWAN; COMPUTIME Ltd., Pak Shek Kok, HONG KONG; Confio Technologies Private Limited, Bangalore, INDIA; Connected Object, Paris Cedex 12, FRANCE; Control4, Salt Lake City, UT; Coqon GmbH, Bonn, GERMANY; Cozify Oy, Espoo, FINLAND; Danfoss A/S, Nordborg, DENMARK; Digital Home Systems PTY LTD., Victoria, AUSTRALIA; Dongguan Will Power Technology Co., Ltd., Guangdong, PEOPLE'S REPUBLIC OF CHINA; Duke Energy Business Services LLC, Charlotte, NC; Dwelo, Inc., Draper, UT; Eaton, Beachwood, OH; EbV Elektronikbauund Vertriebsges GmbH, Burbach, GERMANY; EcoNet Controls Inc., Burlington, CANADA; Ei Electronics, County Clare, IRELAND; ELTEX Enterprise Ltd., Novosibirsk, RUSSIA; Enerwave, Irvine, CA; Everspring Industry Co., Ltd., New Taipei City, TAIWAN; Evolvere SpA Societa Benefit, Milano, ITALY; Ezlo Innovation, Clifton, NJ; FAKRO sp. z o.o., Nowy Sacz, POLAND; Fantem Technologies (Shenzhen) Co., Ltd., Shenzhen, PEOPLE'S REPUBLIC OF CHINA; Fibar Group S.A., Wysogotowo, POLAND; FireAngel Safety Technology, Coventry, UNITED KINGDOM; Flex Automation (Z-Wave Tecnologia), Sao Paulo, BRAZIL; Focalcrest Limited, Shenzhen, PEOPLE'S REPUBLIC OF CHINA; GOAP Racunalniski inzeniring in avtomatizacija procesov d.o.o. Nova Gorica., Solkan, SLOVENIA; Golden Mark (HK) Limited, Kowloon, HONG KONG; Guangzhou MCOHome Technology Co., LTD., Guangzhou, PEOPLE'S REPUBLIC OF CHINA; HAB Home Intelligence, North Richland Hills, TX; Haier US Appliance Solutions, Inc. dba GE Appliances, Louisville, KY; Hangzhou Hikvision Digital Technology Co., Ltd., Hangzhou City, PEOPLE'S REPUBLIC OF CHINA; Hangzhou Lifesmart Technology Co., Ltd., Hangzhou, PEOPLE'S REPUBLIC OF CHINA; Hangzhou Roombanker Technology Co., Ltd., Hangzhou City, PEOPLE'S REPUBLIC OF CHINA; Heatit Controls AB, Brastad, SWEDEN; HELTUN Inc., Los Altos Hills, CA; homee GmbH, Berlin, GERMANY; HOPPE AG, Stadthallendorf, GERMANY; ID Lock AS, Moi, NORWAY; ILEVIA

SRL, Bassano del Grappa VI, ITALY; Inergy Systems LLC, Tempe, AZ; Intermatic Incorporated, Spring Grove, IL; Jasco Products, Oklahoma City, OK; JLab Corporation, Tokyo, JAPAN; Johnson Controls Inc., Milwaukee, WI; Leak Intelligence LLC, Franklin, TN; Leviton Manufacturing Company, Inc., Melville, NY; Logic Group A/S, Broendby, DENMARK; MERCURY Corporation, Incheon, SOUTH KOREA; Mitsumi Electric Co., LTD, Tokyo, JAPAN; MIWA LOCK CO., LTD, Tokyo, JAPAN; MK Logic GmbH, Zwickau, GERMANY; Nanjing IoT Intelligent Technology Co., Ltd., Nanjing, PEOPLE'S REPUBLIC OF CHINA; NAPCO SECURITY TECHNOLOGIES, Amityville, NY; Ness Corporation Pty Limited, New South Wales, AUSTRALIA; Nexa Trading AB, Askim, SWEDEN; NIE-TECH CO., LTD., Dongguan City, PEOPLE'S REPUBLIC OF CHINA; Ningbo Dooyea Mechanic & Electronic Technology Co., Ltd., Ningbo, PEOPLE'S REPUBLIC OF CHINA; Nortek Security & Control, Carlsbad, CA; OBLO Living, Novi Sad, SERBIA; PassivSystems Limited, Berkshire, UNITED KINGDOM; Perenio IOT spol s.r.o., Ricany-Jazlovice, CZECH REPUBLIC; Philio Technology Corporation, New Taipei City, TAIWAN; Quby B.V., Amsterdam, THE NETHERLANDS; Rehau AG + Co, Rehau, GERMANY; Remote Technologies Inc., Shakopee, MN; Remotec Technology Limited, Kowloon, HONG KONG; Rently Keyless, Los Angeles, CA; Resideo Technologies, Inc., Melville, NY; RISCO Group Ltd., Rishon, ISRAEL; Sagemcom Broadband SAS, Rueil-Malmaison Cedex, FRANCE; SALTO Systems, Oartzun, SPAIN; Schlage Lock Company, LLC, Carmel, IN; Secure Meters UK Ltd., Bristol, UNITED KINGDOM; Sensative AB, Lund, SWEDEN; Sharp Corporation, Osaka-fu, JAPAN; Sheenway Asia Limited, Kowloon, HONG KONG; Shenzhen Kaadas Intelligent Technology Co., Ltd, Shenzhen, PEOPLE'S REPUBLIC OF CHINA; SHENZHEN NEO ELECTRONICS CO., LTD, Shenzhen, PEOPLE'S REPUBLIC OF CHINA; SHENZHEN SHYUGJ TECHNOLOGY CO., LTD, Shenzhen, PEOPLE'S REPUBLIC OF CHINA; Shenzhen Sunricher Technology Limited, Shenzhen, PEOPLE'S REPUBLIC OF CHINA; Smart Systems LLC, Moscow, RUSSIA; SmartRent.com, INC, Scottsdale, AZ; Spectrum Brands Inc., Lake Forest, CA; Swidget Corp, Kingston, CANADA; Taiwan Fu Hsing Industrial Co., Ltd, Kaohsiung City, TAIWAN; TechniSat Digital GmbH, Daun, GERMANY; TEM AG, Chur,

SWEDEN; Tepttron AB, Varburg, SWEDEN; Thinka BV, Amsterdam, THE NETHERLANDS; TLJ Access Control, East Yorkshire, UNITED KINGDOM; Transducers Direct, Cincinnati, OH; Tri plus grupa d.o.o. (Zipato), Zagreb, CROATIA; Ubitech Limited, Tsuen Wan, HONG KONG; Universal Electronics Inc., Scottsdale, AZ; Universal Remote Control, Inc., Harrison, NY; VDA Group SpA a S.U., Pordenone, ITALY; Viewqwest Pte Ltd., Singapore, SINGAPORE; Vision-Elec. Technology Co., Ltd., Tainan City, TAIWAN; Webee Corporation, Sunnyvale, CA; WeBeHome, Bromma, SWEDEN; WiDom Srl, Cagliari, ITALY; Yardi Systems, Goleta, CA; Danalock ApS, Harlev, DENMARK; Pepper One GmbH, Zwickau, GERMANY; and ADT, Boca Raton, FL.

Z-Wave Alliance Inc. was formed as a Delaware non-stock member corporation. The general area of Z-Wave Alliance Inc.'s planned activity is to support the development and extension of the Z-Wave wireless communication protocol and promote the protocol as a key enabling technology for 'smart' home and business applications, and to undertake such other activities as may from time to time be appropriate to further the purposes and achieve the goals set forth above.

Membership in Z-Wave Alliance, Inc. remains open and Z-Wave Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

**Suzanne Morris,**

*Chief, Premerger and Division Statistics Unit, Antitrust Division.*

[FR Doc. 2020-26453 Filed 11-30-20; 8:45 am]

**BILLING CODE 4410-11-P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

[Docket No. DEA-508F]

#### **Final Adjusted Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2020**

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Final order.

**SUMMARY:** This final order establishes the final adjusted 2020 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act and the assessment of annual needs for the list

I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

**DATES:** This order is effective December 1, 2020.

#### **FOR FURTHER INFORMATION CONTACT:**

Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, VA 22152, Telephone: (571) 362-3261.

#### **SUPPLEMENTARY INFORMATION:**

#### **Legal Authority**

Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas (APQ) for each basic class of controlled substances listed in schedules I and II and for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. The Attorney General has delegated this function to the Administrator of the Drug Enforcement Administration (DEA) pursuant to 28 CFR 0.100.

#### **Background**

DEA published the 2020 established APQ for controlled substances in schedules I and II and for the assessment of annual needs (AAN) for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine in the **Federal Register** on December 2, 2019. 84 FR 66014. DEA is committed to preventing and limiting diversion by enforcing laws and regulations regarding controlled substances and the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, while meeting the legitimate medical, scientific, and export needs of the United States. This notice stated that the Administrator would adjust, as needed, the established APQ in 2020 in accordance with 21 CFR 1303.13 and 21 CFR 1315.13.

In response to the public health emergency declared by the Secretary of Health and Human Services (HHS) on January 31, 2020, DEA published the final order titled "Adjustments to Aggregate Production Quotas for Certain Schedule II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine and Pseudoephedrine for 2020" on April 10, 2020. (85 FR 20302). While the adjustments were effective immediately, all interested persons were invited to comment on or object to the adjustments on or before May 11, 2020.

The 2020 proposed adjusted APQ for controlled substances in schedules I and II and AAN for the list I chemicals

ephedrine, pseudoephedrine, and phenylpropanolamine were subsequently published in the **Federal Register** on September 1, 2020, (85 FR 54414), after consideration of the criteria outlined in that notice. All interested persons were invited to comment on or object to the proposed APQs and AANs on or before October 1, 2020.

#### Comments Received

DEA received five timely comments and one untimely comment in response to the April **Federal Register** notice and nine comments in response to the September **Federal Register** notice from patients, DEA-registered entities, and non-DEA entities. The comments included appreciation of DEA's response to the public health emergency, concerns about potential drug shortages, interference with doctor-patient relationships, and comments outside the scope of this final order.

*Issue:* Commenters expressed appreciation of DEA's flexibility in responding to the nationwide public health emergency declared by the Secretary of HHS on January 31, 2020, by adjusting APQ for select schedule II controlled substances and list I chemicals.

*DEA Response:* DEA acknowledges the expressions of appreciation to changes in the APQ and AAN. The adjustments to select schedule II controlled substances and list I chemicals occurred after DEA consulted with HHS and determined the utilization rates for these drugs substantially increased due to the treatment regimens for ventilator patients stricken with the Coronavirus Disease of 2019 (COVID-19) compared to the previously estimated annual consumption rates. While the estimates from HHS provided a wide range in the number of patients that would require ventilation treatment due to COVID-19, DEA could, under 21 CFR 1303.13 and 1315.13, adjust the APQ and AAN for schedule II controlled substances and list I chemicals, respectively, to ensure manufacturing activities cover the upper range of the estimate could occur in a timely manner. DEA highlights factor 21 CFR 1303.13(b)(5) specifically, which allowed the Acting Administrator to increase the APQ and AAN for select controlled substances and list I chemicals to meet additional estimated medical needs as determined by HHS due to the unforeseen emergency caused by the COVID-19 pandemic.

*Issue:* Commenters expressed general concerns that decreasing the APQ of controlled substances could lead to

shortages of controlled substance medications.

One DEA-registered entity submitted a comment requesting the APQ for hydrocodone (for sale) and oxycodone (for sale) be sufficient to provide for the estimated medical, scientific, research, and industrial needs of the United States, for export requirements, and for the establishment and maintenance of reserve stocks.

*DEA Response:* DEA sets APQ in a manner to ensure that the estimated medical, scientific, research, industrial needs of the United States, lawful export requirements, and for the establishment and maintenance of reserve stocks. As discussed in both notices for adjustments, any adjustments to the APQ for controlled substances is based on factors set forth in 21 CFR 1303.13. In the event of a shortage, the CSA provides a mechanism under which DEA will, in appropriate circumstances, increase quotas to address shortages. 21 U.S.C. 826(h). Under 21 U.S.C. 826(h)(1), after receiving a request to address a shortage, DEA has 30 days to complete review of the request and determine whether adjustments are necessary to address the shortage. If adjustments are necessary, DEA is required to increase the APQ and individual production quotas to alleviate the shortage. *Id.* If DEA determines adjustments are not necessary, DEA is required to "provide a written response detailing the basis for the . . . determination." *Id.* In addition to what Section 826(h)(1) requires, when DEA is notified of an alleged shortage, DEA will confer with the U.S. Food and Drug Administration and relevant manufacturers regarding the amount of material in physical inventory, current quota granted, and the estimated legitimate medical need, to determine whether a quota adjustment is necessary to alleviate any factually valid shortage.

In accordance with 21 CFR 1303.13, DEA considered the comments for hydrocodone (for sale) and oxycodone (for sale), and the Acting Administrator determined the proposed adjusted 2020 APQs for these substances as published in the **Federal Register** on September 1, 2020, (85 FR 54414), are sufficient to meet the current 2020 estimated medical, scientific, research, and industrial needs of the United States, and to provide for adequate reserve stock.

*Issue:* DEA received comments of general concerns alleging decreases to the APQ interfered with doctor-patient relationships.

*DEA Response:* In determining the APQ, DEA considers prescriptions that

have been issued. However, DEA does not interfere with doctor-patient relationships. Doctors authorized to dispense controlled substances are responsible for adhering to the laws and regulations set forth under the CSA, which requires doctors to only write prescriptions for a legitimate medical need. DEA is responsible for enforcing controlled substance laws and regulations, and is committed to ensuring an adequate and uninterrupted supply of controlled substances in order to meet the demand of legitimate medical, scientific, and export needs of the United States.

*Untimely Comment Issue:* The DEA received one comment from a DEA-registered entity for previously established value of the 2020 AAN for pseudoephedrine (for conversion), requesting an increase because the established AAN is not adequate to cover the commenter's new projected need for 2020.

*DEA Response:* The comment was received in between the comment periods for the two notices of adjustment. Even though the comment was outside the comment period that ended on May 11, 2020, DEA considered this comment as part of the second comment period ending on October 1, 2020, when setting the final 2020 AAN.

*Out of Scope Comments:* DEA received comments on issues outside the scope of this final order. The comments were general in nature and raised issues of specific medical illnesses, medical treatments, and medication costs, and therefore, are outside of the scope of this Final Order for 2020 and do not impact the original analysis involved in finalizing the 2020 APQ.

#### Analysis for Final Adjusted 2020 Aggregate Production Quotas and Assessment of Annual Needs

In determining the final adjusted 2020 APQ and AAN, DEA has considered the above comments relevant to this Final Order for calendar year 2020, along with the factors set forth in 21 CFR 1303.13 and 21 CFR 1315.13, in accordance with 21 U.S.C. 826(a). DEA has also considered other relevant factors, including the 2019 year-end inventories, initial 2020 manufacturing and import quotas, 2020 export requirements, actual and projected 2020 sales, research and product development requirements, additional applications received, and the extent of any diversion of the controlled substance in the class. Based on all of the above, the Acting Administrator is adjusting the 2020 APQ for the following: Increases for

Amphetamine (for sale) and Methamphetamine, based on the data received since the publication of the 2020 proposed adjustment for APQ and AAN in the **Federal Register** on September 1, 2020 (85 FR 54414); increases for Crotonyl Fentanyl, Ethylone, and Isotonitazene due to the

publication of their schedule I temporary controlled status; and increases for Etomidate due to additional manufacturers entering the reference standard market. This final order reflects those adjustments. Pursuant to the above, the Acting Administrator hereby finalizes the 2020

APQ for the following schedule I and II controlled substances and the 2020 AAN for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, expressed in grams of anhydrous acid or base, as follows:

| Basic class                                                                                                      | Final revised<br>2020 quotas |
|------------------------------------------------------------------------------------------------------------------|------------------------------|
|                                                                                                                  | (g)                          |
| <b>Temporarily Scheduled Substances</b>                                                                          |                              |
| Crotonyl fentanyl .....                                                                                          | 25                           |
| Ethylone .....                                                                                                   | 25                           |
| Isotonitazene .....                                                                                              | 25                           |
| <b>Schedule I</b>                                                                                                |                              |
| 1-[1-(2-Thienyl)cyclohexyl]pyrrolidine .....                                                                     | 20                           |
| 1-(1-Phenylcyclohexyl)pyrrolidine .....                                                                          | 15                           |
| 1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine .....                                                             | 10                           |
| 1-(5-Fluoropentyl)-3-(1-naphthoyl)indole (AM2201) .....                                                          | 30                           |
| 1-(5-Fluoropentyl)-3-(2-iodobenzoyl)indole (AM694) .....                                                         | 30                           |
| 1-Benzylpiperazine .....                                                                                         | 25                           |
| 1-Methyl-4-phenyl-4-propionoxypiperidine .....                                                                   | 10                           |
| 1-[1-(2-Thienyl)cyclohexyl]piperidine .....                                                                      | 15                           |
| 2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E) .....                                                           | 30                           |
| 2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D) .....                                                          | 30                           |
| 2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N) .....                                                          | 30                           |
| 2-(2,5-Dimethoxy-4-(n-propylphenyl)ethanamine (2C-P) .....                                                       | 30                           |
| 2-(2,5-Dimethoxyphenyl)ethanamine (2C-H) .....                                                                   | 100                          |
| 2-(4-Bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B-NBOMe; 2C-B-NBOMe; 25B; Cimbi-36) .....       | 30                           |
| 2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C) .....                                                          | 30                           |
| 2-(4-Chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C-NBOMe; 2C-C-NBOMe; 25C; Cimbi-82) .....      | 25                           |
| 2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I) .....                                                            | 30                           |
| 2-(4-Iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I-NBOMe; 2C-I-NBOMe; 25I; Cimbi-5) .....         | 30                           |
| 2,5-Dimethoxy-4-ethylamphetamine (DOET) .....                                                                    | 25                           |
| 2,5-Dimethoxy-4-(n-propylthiophenethylamine) .....                                                               | 25                           |
| 2,5-Dimethoxyamphetamine (DMA) .....                                                                             | 25                           |
| 2-(4-Ethylthio-2,5-dimethoxyphenyl)ethanamine (2C-T-2) .....                                                     | 30                           |
| 2-(4-(Isopropylthio)-2,5-dimethoxyphenyl)ethanamine (2C-T-4) .....                                               | 30                           |
| 3,4,5-Trimethoxyamphetamine .....                                                                                | 30                           |
| 3,4-Methylenedioxyamphetamine (MDA) .....                                                                        | 55                           |
| 3,4-Methylenedioxymethamphetamine (MDMA) .....                                                                   | 50                           |
| 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) .....                                                               | 40                           |
| 3,4-Methylenedioxy-N-methylcathinone (methyline) .....                                                           | 40                           |
| 3,4-Methylenedioxypropylvalerone (MDPV) .....                                                                    | 35                           |
| 3-Fluoro-N-methylcathinone (3-FMC) .....                                                                         | 25                           |
| 3-Methylfentanyl .....                                                                                           | 30                           |
| 3-Methylthiofentanyl .....                                                                                       | 30                           |
| 4-Bromo-2,5-dimethoxyamphetamine (DOB) .....                                                                     | 30                           |
| 4-Bromo-2,5-dimethoxyphenethylamine (2-CB) .....                                                                 | 25                           |
| 4-Chloro-alpha-pyrrolidinovalerophenone (4-chloro-alpha-PVP) .....                                               | 25                           |
| 1-(4-Cyanobutyl)-N-(2-phenylpropan-2-yl)-1 H-indazole-3-carboximide (4CN-Cumyl-Butinaca) .....                   | 25                           |
| 4-Fluoroisobutyl fentanyl .....                                                                                  | 30                           |
| 4-Fluoro-N-methylcathinone (4-FMC; Flephedrone) .....                                                            | 25                           |
| 4-Methyl-N-ethylcathinone (4-MEC) .....                                                                          | 25                           |
| 4-Methoxyamphetamine .....                                                                                       | 150                          |
| 4-Methyl-2,5-dimethoxyamphetamine (DOM) .....                                                                    | 25                           |
| 4-Methylaminorex .....                                                                                           | 25                           |
| 4-Methyl-N-methylcathinone (mephedrone) .....                                                                    | 45                           |
| 4-Methyl-alpha-ethylaminopentiophenone (4-MEAP) .....                                                            | 25                           |
| 4-Methyl-alpha-pyrrolidinohexiophenone (MPPH) .....                                                              | 25                           |
| 4-Methyl-alpha-pyrrolidinopropiophenone (4-MePPP) .....                                                          | 25                           |
| 5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol .....                                              | 50                           |
| 5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP-47,497 C8-homolog) ..... | 40                           |
| 5F-CUMYL-PINACA .....                                                                                            | 25                           |
| 5F-EDMB-PINACA .....                                                                                             | 25                           |
| 5F-MDMB-PICA .....                                                                                               | 25                           |
| 5F-AB-PINACA; N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide .....            | 25                           |
| 5F-CUMYL-P7AICA; (1-(5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3-carboximide) .....      | 25                           |
| 5F-ADB; 5F-MDMB-PINACA (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate) .....     | 30                           |

| Basic class                                                                                                | Final revised<br>2020 quotas |
|------------------------------------------------------------------------------------------------------------|------------------------------|
|                                                                                                            | (g)                          |
| 5F-AMB (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3-methylbutanoate) .....                   | 30                           |
| 5F-APINACA; 5F-AKB48 (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide) .....               | 30                           |
| 5-Fluoro-PB-22; 5F-PB-22 .....                                                                             | 20                           |
| 5-Fluoro-UR144, XLR11 ([1-(5-fluoro-pentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone .....  | 25                           |
| 5-Methoxy-3,4-methylenedioxymphetamine .....                                                               | 25                           |
| 5-Methoxy-N,N-diisopropyltryptamine .....                                                                  | 25                           |
| 5-Methoxy-N,N-dimethyltryptamine .....                                                                     | 25                           |
| AB-CHMINACA .....                                                                                          | 30                           |
| AB-FUBINACA .....                                                                                          | 50                           |
| AB-PINACA .....                                                                                            | 30                           |
| ADB-FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide) ..... | 30                           |
| Acetorphine .....                                                                                          | 25                           |
| Acetyl Fentanyl .....                                                                                      | 100                          |
| Acetyl-alpha-methylfentanyl .....                                                                          | 30                           |
| Acetyldihydrocodeine .....                                                                                 | 30                           |
| Acetylmethadol .....                                                                                       | 25                           |
| Acryl Fentanyl .....                                                                                       | 25                           |
| ADB-PINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide) .....             | 50                           |
| AH-7921 .....                                                                                              | 30                           |
| Allylprodine .....                                                                                         | 25                           |
| Alphacetylmethadol .....                                                                                   | 25                           |
| Alpha-Ethyltryptamine .....                                                                                | 25                           |
| Alphameprodine .....                                                                                       | 25                           |
| Alphamethadol .....                                                                                        | 25                           |
| Alphaprodine .....                                                                                         | 25                           |
| Alpha-Methylfentanyl .....                                                                                 | 30                           |
| Alpha-Methylthiofentanyl .....                                                                             | 30                           |
| Alpha-Methyltryptamine (AMT) .....                                                                         | 25                           |
| Alpha-Pyrrolidinobutylphenone ( $\alpha$ -PBP) .....                                                       | 25                           |
| Alpha-Pyrrolidinoheptaphenone (PV8) .....                                                                  | 25                           |
| Alpha-Pyrrolidinohexanophenone ( $\alpha$ -PHP) .....                                                      | 25                           |
| Alpha-Pyrrolidinopentylphenone ( $\alpha$ -PVP) .....                                                      | 25                           |
| Aminorex .....                                                                                             | 25                           |
| Anileridine .....                                                                                          | 20                           |
| APINACA, AKB48 (N-(1-adamantyl)-1-pentyl-1H-indazole-3-carboxamide) .....                                  | 25                           |
| Benzethidine .....                                                                                         | 25                           |
| Benzylmorphine .....                                                                                       | 30                           |
| Betacetylmethadol .....                                                                                    | 25                           |
| Beta-Hydroxy-3-methylfentanyl .....                                                                        | 30                           |
| Beta-Hydroxyfentanyl .....                                                                                 | 30                           |
| Beta-Hydroxythiofentanyl .....                                                                             | 30                           |
| Betameprodine .....                                                                                        | 25                           |
| Betamethadol .....                                                                                         | 4                            |
| Betaprodine .....                                                                                          | 25                           |
| Bufotenine .....                                                                                           | 15                           |
| Butylone .....                                                                                             | 25                           |
| Butyryl fentanyl .....                                                                                     | 30                           |
| Cathinone .....                                                                                            | 40                           |
| Clonitazene .....                                                                                          | 25                           |
| Codeine methylbromide .....                                                                                | 30                           |
| Codeine-N-oxide .....                                                                                      | 192                          |
| Cyclopentyl Fentanyl .....                                                                                 | 30                           |
| Cyclopropyl Fentanyl .....                                                                                 | 20                           |
| Cyprenorphine .....                                                                                        | 25                           |
| Desomorphine .....                                                                                         | 25                           |
| Dextromoramide .....                                                                                       | 25                           |
| Diampromide .....                                                                                          | 20                           |
| Diethylthiambutene .....                                                                                   | 20                           |
| Diethyltryptamine .....                                                                                    | 25                           |
| Difenoxin .....                                                                                            | 9,200                        |
| Dihydromorphine .....                                                                                      | 753,500                      |
| Dimenoxadol .....                                                                                          | 25                           |
| Dimepheptanol .....                                                                                        | 25                           |
| Dimethylthiambutene .....                                                                                  | 20                           |
| Dimethyltryptamine .....                                                                                   | 50                           |
| Dioxaphetyl butyrate .....                                                                                 | 25                           |
| Dipipanone .....                                                                                           | 25                           |
| Drotebanol .....                                                                                           | 25                           |
| Ethylmethylthiambutene .....                                                                               | 25                           |
| Etonitazene .....                                                                                          | 25                           |
| Etorphine .....                                                                                            | 30                           |

| Basic class                                                                                                                | Final revised<br>2020 quotas |
|----------------------------------------------------------------------------------------------------------------------------|------------------------------|
|                                                                                                                            | (g)                          |
| Etoperidine .....                                                                                                          | 25                           |
| Fenethylamine .....                                                                                                        | 30                           |
| Fentanyl related substances .....                                                                                          | 600                          |
| FUB-144 .....                                                                                                              | 25                           |
| FUB-AKB48 .....                                                                                                            | 25                           |
| FUB-AMB, MMB-Fubinaca, AMB-Fubinaca .....                                                                                  | 25                           |
| Furanyl fentanyl .....                                                                                                     | 30                           |
| Furethidine .....                                                                                                          | 25                           |
| Gamma Hydroxybutyric Acid .....                                                                                            | 29,417,000                   |
| Heroin .....                                                                                                               | 45                           |
| Hydromorphanol .....                                                                                                       | 40                           |
| Hydroxypethidine .....                                                                                                     | 25                           |
| Ibogaine .....                                                                                                             | 30                           |
| Isobutyryl Fentanyl .....                                                                                                  | 25                           |
| JWH-018 and AM678 (1-Pentyl-3-(1-naphthoyl)indole) .....                                                                   | 35                           |
| JWH-019 (1-Hexyl-3-(1-naphthoyl)indole) .....                                                                              | 45                           |
| JWH-073 (1-Butyl-3-(1-naphthoyl)indole) .....                                                                              | 45                           |
| JWH-081 (1-Pentyl-3-(1-(4-methoxynaphthoyl)indole) .....                                                                   | 30                           |
| JWH-122 (1-Pentyl-3-(4-methyl-1-naphthoyl)indole) .....                                                                    | 30                           |
| JWH-200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole) .....                                                           | 35                           |
| JWH-203 (1-Pentyl-3-(2-chlorophenylacetyl)indole) .....                                                                    | 30                           |
| JWH-250 (1-Pentyl-3-(2-methoxyphenylacetyl)indole) .....                                                                   | 30                           |
| JWH-398 (1-Pentyl-3-(4-chloro-1-naphthoyl)indole) .....                                                                    | 30                           |
| Ketobemidone .....                                                                                                         | 30                           |
| Levomoramide .....                                                                                                         | 25                           |
| Levophenacetylmorphan .....                                                                                                | 25                           |
| Lysergic acid diethylamide (LSD) .....                                                                                     | 40                           |
| MAB-CHMINACA; ADB-CHMINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide) ..... | 30                           |
| MDMB-CHMICA; MMB-CHMINACA (methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate) .....            | 30                           |
| MDMB-FUBINACA (methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate) .....                        | 30                           |
| MMB-CHMICA (AMB-CHMICA); Methyl-2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate .....                   | 25                           |
| Marihuana .....                                                                                                            | 3,200,000                    |
| Mecloqualone .....                                                                                                         | 30                           |
| Mescaline .....                                                                                                            | 25                           |
| Methaqualone .....                                                                                                         | 60                           |
| Methcathinone .....                                                                                                        | 25                           |
| Methoxyacetyl fentanyl .....                                                                                               | 30                           |
| Methyldesorphine .....                                                                                                     | 5                            |
| Methylidihydromorphan .....                                                                                                | 25                           |
| Morpheridine .....                                                                                                         | 25                           |
| Morphine methylbromide .....                                                                                               | 5                            |
| Morphine methylsulfonate .....                                                                                             | 5                            |
| Morphine-N-oxide .....                                                                                                     | 150                          |
| MT-45 .....                                                                                                                | 30                           |
| Myrophine .....                                                                                                            | 25                           |
| NM2201; Naphthalen-1-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate .....                                                   | 25                           |
| N,N-Dimethylamphetamine .....                                                                                              | 25                           |
| Naphyrone .....                                                                                                            | 25                           |
| N-Ethyl-1-phenylcyclohexylamine .....                                                                                      | 25                           |
| N-Ethyl-3-piperidyl benzilate .....                                                                                        | 10                           |
| N-Ethylamphetamine .....                                                                                                   | 24                           |
| N-Ethylhexedrone .....                                                                                                     | 25                           |
| N-Ethylpentylone, ephylone .....                                                                                           | 30                           |
| N-Hydroxy-3,4-methylenedioxyamphetamine .....                                                                              | 24                           |
| N-Methyl-3-Piperidyl Benzilate .....                                                                                       | 30                           |
| Nicocodeine .....                                                                                                          | 25                           |
| Nicomorphine .....                                                                                                         | 25                           |
| Noracymethadol .....                                                                                                       | 25                           |
| Norlevorphanol .....                                                                                                       | 55                           |
| Normethadone .....                                                                                                         | 25                           |
| Normorphine .....                                                                                                          | 40                           |
| Norpipanone .....                                                                                                          | 25                           |
| Ocfentanyl .....                                                                                                           | 25                           |
| Ortho-fluorofentanyl, 2-fluorofentanyl .....                                                                               | 30                           |
| Para-chloroisobutyryl fentanyl .....                                                                                       | 30                           |
| Para-fluorofentanyl .....                                                                                                  | 25                           |
| Para-fluorobutyryl fentanyl .....                                                                                          | 25                           |
| Para-methoxybutyryl fentanyl .....                                                                                         | 30                           |
| Parahexyl .....                                                                                                            | 5                            |
| PB-22; QUPIC .....                                                                                                         | 20                           |

| Basic class                                                                     | Final revised<br>2020 quotas |
|---------------------------------------------------------------------------------|------------------------------|
|                                                                                 | (g)                          |
| Pentadrone .....                                                                | 25                           |
| Pentylone .....                                                                 | 25                           |
| Phenadoxone .....                                                               | 25                           |
| Phenampromide .....                                                             | 25                           |
| Phenomorphane .....                                                             | 25                           |
| Phenoperidine .....                                                             | 25                           |
| Pholcodine .....                                                                | 5                            |
| Piritramide .....                                                               | 25                           |
| Proheptazine .....                                                              | 25                           |
| Propiridine .....                                                               | 25                           |
| Propiram .....                                                                  | 25                           |
| Psilocybin .....                                                                | 30                           |
| Psilocyn .....                                                                  | 50                           |
| Racemoramide .....                                                              | 25                           |
| SR-18 and RCS-8 (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl)indole) .....       | 45                           |
| SR-19 and RCS-4 (1-Pentyl-3-[(4-methoxy)-benzoyl]indole) .....                  | 30                           |
| Tetrahydrocannabinols .....                                                     | 384,460                      |
| Tetrahydrofuran fentanyl .....                                                  | 15                           |
| Thebacon .....                                                                  | 25                           |
| Thiafentanil .....                                                              | 25                           |
| Thiofentanyl .....                                                              | 25                           |
| THJ-2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone) ..... | 30                           |
| Tilidine .....                                                                  | 25                           |
| Trimeperidine .....                                                             | 25                           |
| UR-144 (1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone .....  | 25                           |
| U-47700 .....                                                                   | 30                           |
| Valeryl fentanyl .....                                                          | 25                           |

## Schedule II

|                                                 |            |
|-------------------------------------------------|------------|
| 1-Phenylcyclohexylamine .....                   | 15         |
| 1-Piperidinocyclohexanecarbonitrile .....       | 25         |
| 4-Anilino-N-phenethyl-4-piperidine (ANPP) ..... | 934,956    |
| Alfentanil .....                                | 3,260      |
| Alphaprodine .....                              | 25         |
| Amobarbital .....                               | 20,100     |
| Amphetamine (for conversion) .....              | 14,137,578 |
| Amphetamine (for sale) .....                    | 44,330,000 |
| Bezitramide .....                               | 25         |
| Carfentanil .....                               | 20         |
| Cocaine .....                                   | 73,090     |
| Codeine (for conversion) .....                  | 3,225,000  |
| Codeine (for sale) .....                        | 35,341,292 |
| Dextropropoxyphene .....                        | 35         |
| Dihydrocodeine .....                            | 156,713    |
| Dihydroetorphine .....                          | 25         |
| Diphenoxylate (for conversion) .....            | 14,100     |
| Diphenoxylate (for sale) .....                  | 770,800    |
| Ecgonine .....                                  | 78,439     |
| Ethylmorphine .....                             | 30         |
| Etorphine hydrochloride .....                   | 32         |
| Fentanyl .....                                  | 934,956    |
| Glutethimide .....                              | 25         |
| Hydrocodone (for conversion) .....              | 1,250      |
| Hydrocodone (for sale) .....                    | 33,997,285 |
| Hydromorphone .....                             | 3,512,651  |
| Isomethadone .....                              | 30         |
| Levo-alphaacetyl methadol (LAAM) .....          | 25         |
| Levomethorphan .....                            | 30         |
| Levorphanol .....                               | 31,730     |
| Lisdexamfetamine .....                          | 21,000,000 |
| Meperidine .....                                | 1,119,862  |
| Meperidine Intermediate-A .....                 | 30         |
| Meperidine Intermediate-B .....                 | 30         |
| Meperidine Intermediate-C .....                 | 30         |
| Metazocine .....                                | 15         |
| Methadone (for sale) .....                      | 25,619,700 |
| Methadone Intermediate .....                    | 27,673,600 |
| Methamphetamine .....                           | 1,224,109  |



| Basic class                                                                                                                                                                                                                        | Final revised<br>2020 quotas |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|
|                                                                                                                                                                                                                                    | (g)                          |
| [678,878 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 505,231 grams for methamphetamine mostly for conversion to a schedule III product; and 40,000 grams for methamphetamine (for sale).] |                              |
| Methylphenidate .....                                                                                                                                                                                                              | 57,438,334                   |
| Metopon .....                                                                                                                                                                                                                      | 25                           |
| Moramide-intermediate .....                                                                                                                                                                                                        | 25                           |
| Morphine (for conversion) .....                                                                                                                                                                                                    | 3,376,696                    |
| Morphine (for sale) .....                                                                                                                                                                                                          | 33,756,703                   |
| Nabilone .....                                                                                                                                                                                                                     | 62,000                       |
| Norfentanyl .....                                                                                                                                                                                                                  | 25                           |
| Noroxymorphone (for conversion) .....                                                                                                                                                                                              | 22,044,741                   |
| Noroxymorphone (for sale) .....                                                                                                                                                                                                    | 376,000                      |
| Opium (powder) .....                                                                                                                                                                                                               | 250,000                      |
| Opium (tincture) .....                                                                                                                                                                                                             | 530,837                      |
| Oripavine .....                                                                                                                                                                                                                    | 33,010,750                   |
| Oxycodone (for conversion) .....                                                                                                                                                                                                   | 725,998                      |
| Oxycodone (for sale) .....                                                                                                                                                                                                         | 65,667,554                   |
| Oxymorphone (for conversion) .....                                                                                                                                                                                                 | 28,204,371                   |
| Oxymorphone (for sale) .....                                                                                                                                                                                                       | 658,515                      |
| Pentobarbital .....                                                                                                                                                                                                                | 25,850,000                   |
| Phenazocine .....                                                                                                                                                                                                                  | 25                           |
| Phencyclidine .....                                                                                                                                                                                                                | 35                           |
| Phenmetrazine .....                                                                                                                                                                                                                | 25                           |
| Phenylacetone .....                                                                                                                                                                                                                | 40                           |
| Piminodine .....                                                                                                                                                                                                                   | 25                           |
| Racemethorphan .....                                                                                                                                                                                                               | 5                            |
| Racemorphan .....                                                                                                                                                                                                                  | 5                            |
| Remifentanyl .....                                                                                                                                                                                                                 | 3,000                        |
| Secobarbital .....                                                                                                                                                                                                                 | 172,100                      |
| Sufentanil .....                                                                                                                                                                                                                   | 4,000                        |
| Tapentadol .....                                                                                                                                                                                                                   | 13,447,541                   |
| Thebaine .....                                                                                                                                                                                                                     | 59,284,070                   |
| <b>List I Chemicals</b>                                                                                                                                                                                                            |                              |
| Ephedrine (for conversion) .....                                                                                                                                                                                                   | 100                          |
| Ephedrine (for sale) .....                                                                                                                                                                                                         | 4,756,000                    |
| Phenylpropanolamine (for conversion) .....                                                                                                                                                                                         | 14,100,000                   |
| Phenylpropanolamine (for sale) .....                                                                                                                                                                                               | 16,590,000                   |
| Pseudoephedrine (for conversion) .....                                                                                                                                                                                             | 1,000                        |
| Pseudoephedrine (for sale) .....                                                                                                                                                                                                   | 200,382,900                  |

The Acting Administrator further proposes that APQ for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 remain at zero.

Timothy J. Shea,  
Acting Administrator.

[FR Doc. 2020-26443 Filed 11-30-20; 8:45 am]

BILLING CODE 4410-09-P

## DEPARTMENT OF JUSTICE

## DEPARTMENT OF THE INTERIOR

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA) and Notice of Availability of Draft Restoration Plan/Environmental Assessment of Restoration Project Incorporated Into Proposed Consent Decree

On November 12, 2020, the Department of Justice lodged a proposed consent decree with the United States District Court for the Western District

Washington in the lawsuit entitled *United States of America, State of Washington, Suquamish Tribe, and Muckleshoot Indian Tribe v. City of Seattle*, Civil Action No. 16-1486 (W.D. Wa.).

The complaint asserts claims for natural resource damages by the United States on behalf of the National Oceanic and Atmospheric Administration and the Department of the Interior; the State of Washington; the Suquamish Tribe; and the Muckleshoot Indian Tribe (collectively, the "Natural Resource Trustees") pursuant to the section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a); section 311 of the Clean Water Act (CWA), 33 U.S.C. 1321; section 1002(b) of the Oil Pollution Act (OPA), 33 U.S.C. 2702(b); and the Washington Model Toxics Control Act (MTCA), RCW 70.105D.

The proposed consent decree settles claims for natural resource damages caused by hazardous substances released from City of Seattle facilities along the Lower Duwamish Waterway. Under the proposed consent decree, the City of Seattle will purchase restoration credits in one or more projects approved by the Natural Resource Trustees to create habitat for injured natural resources, including various species of fish and birds. The City of Seattle also will establish conservation easements on parcels along the Lower Duwamish Waterway to ensure that restoration projects constructed on those parcels are preserved, and the City will pay approximately \$91,000 of the Trustees' damage assessment costs. The City will also pay Bluefield Holdings, Inc., to operate and maintain a restoration project under the Trustees' oversight, and Bluefield will reimburse the Trustees' future oversight costs for this project. The Natural Resource Trustees will provide the City of Seattle with covenants not to sue under the statutes listed in the complaint and proposed consent decree for specified natural resource damages.

The Natural Resource Trustees have developed a Draft Restoration Plan and Environmental Assessment ("RP/EA") for Project 1, the restoration project incorporated into the Consent Decree that is being developed by Bluefield Holdings, Inc. The Draft RP/EA proposes to select Project 1 as one of the projects to address injuries to natural resources in the Lower Duwamish Waterway.

The publication of this notice opens a period for public comment on the proposed Consent Decree and the Draft RP/EA. Comments on the proposed Consent Decree should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, State of Washington, Suquamish Tribe, and Muckleshoot Indian Tribe v. City of Seattle*, D.J. Ref. No. 90-11-3-07227/2. 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 .....      | <a href="mailto:pubcomment-ees.enrd@usdoj.gov">pubcomment-ees.enrd@usdoj.gov</a> .            |
| By mail .....       | Assistant Attorney General,<br>U.S. DOJ—ENRD, P.O.<br>Box 7611, Washington, DC<br>20044-7611. |

During the public comment period, the Consent Decree may be examined

and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044-7611.

Please enclose a check or money order for \$21.25 (without attachments) or \$57.00 (with attachments) (25 cents per page reproduction cost) payable to the United States Treasury.

The publication of this notice also opens a period for public comment on the Draft RP/EA. The Trustees will receive comments relating to the draft RP/EA for a period of thirty (30) days from the date of this publication. A copy of the Draft RP/EA is available electronically at <https://www.fws.gov/wafwo/>. A copy of the Draft RP/EA also may be obtained by mail from: Assistant Solicitor, Environmental Restoration Branch, Office of the Solicitor, U.S. Department of the Interior, 1849 C Street NW, Washington, DC 20240.

Please reference: Draft RP/EA related to *United States et al. v. City of Seattle* Consent Decree. When requesting a copy of the Draft RP/EA please enclose a check in the amount of \$7.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Comments on the draft RP/EA may be submitted electronically to [jeff\\_krausmann@fws.gov](mailto:jeff_krausmann@fws.gov). Additionally, written comments on the Draft RP/EA should be addressed to: Jeff Krausmann, Washington Fish and Wildlife Office, U.S. Fish and Wildlife Service, 510 Desmond Drive SE, Suite 102, Lacey, WA 98503-1263, [Jeff\\_krausmann@fws.gov](mailto:Jeff_krausmann@fws.gov).

**Susan M. Akers,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2020-26442 Filed 11-30-20; 8:45 am]

**BILLING CODE 4410-15-P**

## DEPARTMENT OF JUSTICE

[OMB Number 1121-0030]

### Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Currently Approved Collection: Capital Punishment Report of Inmates Under Sentence of Death

**AGENCY:** Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

**ACTION:** 30-Day notice.

**SUMMARY:** The Bureau of Justice Statistics, Office of Justice Programs, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 30 days until December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

**SUPPLEMENTARY INFORMATION:** This proposed information collection was previously published in the **Federal Register** at Volume 85, Number 200, page 65427, October 15, 2020, allowing for a 60-day comment period.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

### Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *The Title of the Form/Collection:* Capital Punishment Report of Inmates under Sentence of Death.

(3) *The agency form number, if any, and the applicable component of the*

*Department sponsoring the collection:*

The form numbers for the questionnaires are: NPS–8 (Report of Inmates under Sentence of Death); NPS–8A (Update Report of Inmate under Sentence of Death); NPS–8B (Status of Death Penalty—No Statute in Force); and NPS–8C (Status of Death Penalty—Statute in Force). The applicable component within the Department of Justice is the Bureau of Justice Statistics, in the Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Respondents will be staff from state departments of correction, state Attorneys General, the Federal Bureau of Prisons, and the U.S. Attorney for the District of Columbia. Staff responsible for keeping records on inmates under sentence of death in their jurisdiction and in their custody are asked to provide the following information: *Condemned inmates'* demographic characteristics, legal status at the time of capital offense, capital offense for which imprisoned, number of death sentences imposed, criminal history information, reason for removal and current status if no longer under sentence of death, method of execution, and cause of death by means other than execution. Personnel in the offices of each Attorney General are asked to provide information regarding the status of death penalty laws and any changes to the laws enacted during the reference year. The Bureau of Justice Statistics uses this information in published reports and in responding to queries from the U.S. Congress, Executive Office of the President, the U.S. Supreme Court, state officials, international organizations, researchers, students, the

media, and others interested in criminal justices statistics.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 35 responses at 30 minutes each for the NPS–8; 2,625 responses at 30 minutes each for the NPS–8A; and 52 responses at 15 minutes each for the NPS–8B or NPS–8C.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1,343 annual total burden hours associated with the collection.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: November 24, 2020.

**Melody Braswell,**

*Department Clearance Officer for PRA,  
Department of Justice.*

[FR Doc. 2020–26377 Filed 11–30–20; 8:45 am]

**BILLING CODE 4410–18–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (“the Act”) and are identified in the Appendix to this notice. Upon receipt of these petitions,

the Administrator of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing provided such request is filed in writing with the Administrator, Office of Trade Adjustment Assistance, at the address shown below, no later than December 11, 2020.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Administrator, Office of Trade Adjustment Assistance, at the address shown below, not later than December 11, 2020.

The petitions filed in this case are available for inspection at the Office of the Administrator, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW, Washington, DC 20210.

Signed at Washington, DC, this 16th day of November 2020.

**Hope D. Kinglock,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

## APPENDIX

[57 TAA petitions instituted between 10/1/20 and 10/31/20]

| TA–W        | Subject firm<br>(petitioners)                                                      | Location              | Date of<br>institution | Date of<br>petition |
|-------------|------------------------------------------------------------------------------------|-----------------------|------------------------|---------------------|
| 96502 ..... | Arcosa Wind Towers, Inc. (State Workforce Office) .....                            | Dallas, TX .....      | 10/01/20               | 09/30/20            |
| 96503 ..... | Sandvik Special Metals LLC. (State Workforce Office) .....                         | Kennewick, WA .....   | 10/01/20               | 09/29/20            |
| 96504 ..... | Howell Metal Company Subsidiary of Mueller Industries<br>(State Workforce Office). | New Market, VA .....  | 10/01/20               | 09/30/20            |
| 96505 ..... | BGF Industries, Inc. (Non-Woven Unit) (State Workforce Of-<br>fice).               | Altavista, VA .....   | 10/02/20               | 10/01/20            |
| 96506 ..... | BGF Industries, Inc. (State Workforce Office) .....                                | Altavista, VA .....   | 10/02/20               | 10/01/20            |
| 96507 ..... | Howmet (State Workforce Office) .....                                              | Hampton, VA .....     | 10/02/20               | 09/30/20            |
| 96508 ..... | Nokia (State Workforce Office) .....                                               | Murray Hill, NJ ..... | 10/02/20               | 10/02/20            |
| 96520 ..... | Acuity Brands (State Workforce Office) .....                                       | Tucson, AZ .....      | 10/05/20               | 10/01/20            |
| 96521 ..... | Citigroup Global Markets Inc. (State Workforce Office) .....                       | New York, NY .....    | 10/06/20               | 10/06/20            |
| 96522 ..... | Renaissance Manufacturing Group (Union Official) .....                             | Waukesha, WI .....    | 10/06/20               | 10/02/20            |
| 96523 ..... | Philips North America (American Job Center) .....                                  | Nashville, TN .....   | 10/06/20               | 10/05/20            |
| 96524 ..... | American Woodmark Corporation (State Workforce Office) ..                          | Cumberland, MD .....  | 10/06/20               | 10/05/20            |
| 96525 ..... | Domtar Paper Company, LLC (Union Official) .....                                   | Kingsport, TN .....   | 10/06/20               | 10/02/20            |
| 96540 ..... | Vestas (State Workforce Office) .....                                              | Pueblo, CO .....      | 10/08/20               | 10/07/20            |
| 96541 ..... | Tobul Accumulators (Company Official) .....                                        | Bamberg, SC .....     | 10/09/20               | 10/08/20            |
| 96542 ..... | Choice Hotels International (State Workforce Office) .....                         | Phoenix, AZ .....     | 10/09/20               | 10/08/20            |
| 96543 ..... | Kimball International (State Workforce Office) .....                               | Jasper, IN .....      | 10/09/20               | 10/08/20            |

## APPENDIX—Continued

[57 TAA petitions instituted between 10/1/20 and 10/31/20]

| TA-W         | Subject firm<br>(petitioners)                                             | Location                | Date of<br>institution | Date of<br>petition |
|--------------|---------------------------------------------------------------------------|-------------------------|------------------------|---------------------|
| 96544 .....  | Freeport McMoran Copper and Gold (State Workforce Office).                | Elizabeth, NJ .....     | 10/09/20               | 10/08/20            |
| 96545 .....  | Encompass Group dba The Pillow Factory (Company Official).                | Buffalo Grove, IL ..... | 10/09/20               | 10/08/20            |
| 96546 .....  | Ricoh USA (State Workforce Office) .....                                  | McLean, VA .....        | 10/09/20               | 10/09/20            |
| 96547 .....  | Castle Metals—Wichita (State Workforce Office) .....                      | Wichita, KS .....       | 10/13/20               | 10/09/20            |
| 96548 .....  | Hair salon (Company Official) .....                                       | Middletown, OH .....    | 10/13/20               | 10/09/20            |
| 96549 .....  | Black Box Corporation of Pennsylvania (Company Official) ..               | Lawrence, PA .....      | 10/13/20               | 10/09/20            |
| 96550 .....  | Collins Aerospace (Rockwell Collins) (State Workforce Office).            | Wilsonville, OR .....   | 10/13/20               | 10/09/20            |
| 96551 .....  | Foveon Incorporated (State Workforce Office) .....                        | San Jose, CA .....      | 10/13/20               | 10/09/20            |
| 96552 .....  | Dura Automotive (State Workforce Office) .....                            | Milan, TN .....         | 10/13/20               | 10/12/20            |
| 96553 .....  | Indian Point Nuclear Generating Units 2 and 3 (Company Official).         | Buchanan, NY .....      | 10/13/20               | 09/28/20            |
| 96554 .....  | EZFlow USA (State Workforce Office) .....                                 | New Castle, PA .....    | 10/13/20               | 10/09/20            |
| 96555 .....  | Federal-Mogul Piston Rings LLC (State Workforce Office) ..                | Sparta, MI .....        | 10/13/20               | 10/09/20            |
| 96556 .....  | Diversant (State Workforce Office) .....                                  | Newton Square, PA ..... | 10/13/20               | 10/13/20            |
| 96557 .....  | Climax Mine (State Workforce Office) .....                                | Leadville, CO .....     | 10/15/20               | 10/14/20            |
| 96558 .....  | FreightCar America (Company Official) .....                               | Cherokee, AL .....      | 10/15/20               | 10/15/20            |
| 96559 .....  | Marmen Energy (State Workforce Office) .....                              | Brandon, SD .....       | 10/16/20               | 10/15/20            |
| 96560 .....  | Pall Corporation (Company Official) .....                                 | Timonium, MD .....      | 10/16/20               | 10/15/20            |
| 96561 .....  | Eaton (Company Official) .....                                            | Ellisville, MO .....    | 10/19/20               | 10/16/20            |
| 96562 .....  | Lee Enterprises (State Workforce Office) .....                            | Omaha, NE .....         | 10/19/20               | 10/16/20            |
| 96563 .....  | Caterpillar Inc., Morton Distribution Center (State Workforce Office).    | Morton, IL .....        | 10/19/20               | 10/16/20            |
| 96564 .....  | Continental (State Workforce Office) .....                                | Newport News, VA .....  | 10/20/20               | 10/19/20            |
| 96565 .....  | Domtar, Ashdown Mill (State Workforce Office) .....                       | Ashdown, AR .....       | 10/21/20               | 10/20/20            |
| 96566 .....  | Asco Power Technologies (State Workforce Office) .....                    | Independence, OH .....  | 10/21/20               | 10/20/20            |
| 96567 .....  | Ascension Information Services (State Workforce Office) ....              | Clayton, MO .....       | 10/22/20               | 10/21/20            |
| 96568 .....  | Cascades Tissue Group Pennsylvania Inc. (Union Official) ..               | Pittston, PA .....      | 10/22/20               | 10/20/20            |
| 96568A ..... | Cascades Tissue Group Pennsylvania Inc. (Union Official) ..               | Ransom, PA .....        | 10/22/20               | 10/20/20            |
| 96569 .....  | Telsmith Inc. (Union Official) .....                                      | Mequon, WI .....        | 10/23/20               | 10/15/20            |
| 96570 .....  | The Hospital of Providence (State Workforce Office) .....                 | El Paso, TX .....       | 10/23/20               | 10/22/20            |
| 96571 .....  | Pactive Evergreen (State Workforce Office) .....                          | Abilene, TX .....       | 10/26/20               | 10/23/20            |
| 96572 .....  | InterDesign Inc. (Workers) .....                                          | Warren, OH .....        | 10/26/20               | 10/23/20            |
| 96573 .....  | Tenneco (State Workforce Office) .....                                    | South Bend, IN .....    | 10/27/20               | 10/26/20            |
| 96574 .....  | Phillips-Medisize Eau Claire (Company Official) .....                     | Eau Claire, WI .....    | 10/28/20               | 10/27/20            |
| 96575 .....  | Nan Ya Plastics (State Workforce Office) .....                            | Wharton, TX .....       | 10/28/20               | 10/27/20            |
| 96576 .....  | IAC Group (Company Official) .....                                        | Greencastle, IN .....   | 10/28/20               | 10/27/20            |
| 96577 .....  | Metaldyne BSM LLC. AAM Fremont Manufacturing Facility (Company Official). | Fremont, IN .....       | 10/28/20               | 10/27/20            |
| 96578 .....  | The Corsi Group Inc. DBA Greenfield Cabinetry (State Workforce Office).   | Elkins, WV .....        | 10/29/20               | 10/28/20            |
| 96579 .....  | Valsoft Corporation/MacPractice (State Workforce Office) ....             | Lincoln, NE .....       | 10/29/20               | 10/28/20            |
| 96580 .....  | Sonoco Plastics (State Workforce Office) .....                            | Yakima, WA .....        | 10/29/20               | 10/26/20            |
| 96581 .....  | Solera Holdings Autopoint (State Workforce Office) .....                  | South Jordan, UT .....  | 10/30/20               | 10/29/20            |
| 96582 .....  | Aquafine Corporation (Company Official) .....                             | Valencia, CA .....      | 10/30/20               | 10/29/20            |

[FR Doc. 2020-26382 Filed 11-30-20; 8:45 am]

## BILLING CODE P

## DEPARTMENT OF LABOR

Employment and Training  
AdministrationPost-Initial Determinations Regarding  
Eligibility To Apply for Trade  
Adjustment Assistance

In accordance with Sections 223 and 284 (19 U.S.C. 2273 and 2395) of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (“Act”), as amended, the Department of Labor herein presents

Notice of Affirmative Determinations Regarding Application for Reconsideration, summaries of Negative Determinations Regarding Applications for Reconsideration, summaries of Revised Certifications of Eligibility, summaries of Revised Determinations (after Affirmative Determination Regarding Application for Reconsideration), summaries of Negative Determinations (after Affirmative Determination Regarding Application for Reconsideration), summaries of Revised Determinations (on remand from the Court of International Trade), and summaries of Negative Determinations (on remand

from the Court of International Trade) regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (“TAA”) for workers by (TA-W) number issued during the period of *October 1, 2020 through October 31, 2020*. Post-initial determinations are issued after a petition has been certified or denied. A post-initial determination may revise a certification, or modify or affirm a negative determination.

Notice of Revised Certifications of  
Eligibility

Revised certifications of eligibility have been issued with respect to cases where affirmative determinations and certificates of eligibility were issued

initially, but a minor error was discovered after the certification was issued. The revised certifications are issued pursuant to the Secretary's authority under section 223 of the Act and 29 CFR 90.16. Revised Certifications of Eligibility are final determinations for purposes of judicial

review pursuant to section 284 of the Act (19 U.S.C. 2395) and 29 CFR 90.19(a).

#### *Revised Certifications of Eligibility*

The following revised certifications of eligibility to apply for TAA have been issued. The date following the company

name and location of each determination references the impact date for all workers of such determination, and the reason(s) for the determination.

The following revisions have been issued.

| TA-W No.     | Subject firm                | Location                                          | Impact date | Reason(s)                             |
|--------------|-----------------------------|---------------------------------------------------|-------------|---------------------------------------|
| 95,191 ..... | MTBC-Med Incorporated ..... | Somerset, NJ .....                                | 4/14/2019   | Ownership Change of a Successor Firm. |
| 95,605 ..... | Cox Machine Inc .....       | Working in Multiple Cities Throughout Kansas, KS. | 1/24/2019   | Worker Group Clarification.           |

I hereby certify that the aforementioned determinations were issued during the period of *October 1, 2020 through October 31, 2020*. These determinations are available on the Department's website [https://www.doleta.gov/tradeact/petitioners/taa\\_search\\_form.cfm](https://www.doleta.gov/tradeact/petitioners/taa_search_form.cfm) under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888-365-6822.

Signed at Washington, DC, this 16th day of November 2020.

**Hope D. Kinglock,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2020-26383 Filed 11-30-20; 8:45 am]

**BILLING CODE 4510-FN-P**

## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **Notice of Determinations Regarding Eligibility To Apply for Trade Adjustment Assistance**

In accordance with the Section 223 (19 U.S.C.2273) of the Trade Act of 1974 (19 U.S.C.2271, *et seq.*) ("Act"), as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act ("TAA") for workers by (TA-W) number issued during the period of *October 1, 2020 through October 31, 2020*. (This Notice primarily follows the language of the Trade Act. In some places however, changes such as the inclusion of subheadings, a reorganization of language, or "and," "or," or other words are added for clarification.)

#### **Section 222(a)—Workers of a Primary Firm**

In order for an affirmative determination to be made for workers of a primary firm and a certification issued

regarding eligibility to apply for TAA, the group eligibility requirements under Section 222(a) of the Act (19 U.S.C. 2272(a)) must be met, as follows:

(1) The first criterion (set forth in Section 222(a)(1) of the Act, 19 U.S.C. 2272(a)(1)) is that a significant number or proportion of the workers in such workers' firm (or "such firm") have become totally or partially separated, or are threatened to become totally or partially separated; and (2(A) or 2(B) below)

(2) The second criterion (set forth in Section 222(a)(2) of the Act, 19 U.S.C. 2272(a)(2)) may be satisfied by either (A) the Increased Imports Path, or (B) the Shift in Production or Services to a Foreign Country Path/Acquisition of Articles or Services from a Foreign Country Path, as follows:

(A) Increased Imports Path:

(i) the sales or production, or both, of such firm, have decreased absolutely; and (ii and iii below)

(ii) (I) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased; or

(II)(aa) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased; or

(II)(bb) imports of articles like or directly competitive with articles which are produced directly using the services supplied by such firm, have increased; or

(III) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; OR

(B) Shift in Production or Services to a Foreign Country Path OR Acquisition of Articles or Services from a Foreign Country Path:

(i) (I) there has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or

(II) such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; and

(ii) the shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.

#### **Section 222(b)—Adversely Affected Secondary Workers**

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for TAA, the group eligibility requirements of Section 222(b) of the Act (19 U.S.C. 2272(b)) must be met, as follows:

(1) a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated; and

(2) the workers' firm is a supplier or downstream producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act (19 U.S.C. 2272(a)), and such supply or production is related to the article or service that was the basis for such certification (as defined in subsection 222(c)(3) and (4) of the Act (19 U.S.C. 2272(c)(3) and (4))); and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation determined under paragraph (1).

#### Section 222(e)—Firms identified by the International Trade Commission

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for TAA, the group eligibility requirements of Section 222(e) of the Act (19 U.S.C.2272(e)) must be met, by following criteria (1), (2), and (3) as follows:

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a

domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1) of the Act (19 U.S.C. 2252(b)(1)); or

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1) of the Act (19 U.S.C. 2436(b)(1)); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A)); and

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) of the Trade Act (19 U.S.C. 2252(f)(1)) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3) (19 U.S.C.2252(f)(3)); or

(B) notice of an affirmative determination described in subparagraph (B) or (C) of paragraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b) of the Act (19 U.S.C.2273(b)), the 1-year period preceding the 1-year period described in paragraph (2).

#### Affirmative Determinations for Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (Increased Imports Path) of the Trade Act have been met.

| TA-W No.     | Subject firm                                                                                      | Location                   | Impact date       |
|--------------|---------------------------------------------------------------------------------------------------|----------------------------|-------------------|
| 95,576 ..... | C&D Technologies, Inc., Doral Corporation, Pieper Electric Inc., Scrub N Shine, Per Mar Security. | Milwaukee, WI .....        | January 17, 2019. |
| 95,585 ..... | Cambria Cogen Company, Northern Star Generation Services, Attem, WorkLink Staffing, etc.          | Ebensburg, PA .....        | January 21, 2019. |
| 95,761 ..... | FEI Company, Inc., Thermo Fisher Scientific, Aerotek, Amerit Consulting, Chipton-Ross, etc.       | Hillsboro, OR .....        | March 2, 2019.    |
| 95,888 ..... | Western Forge, Inc., IDEAL Industries, Staffing Solutions Southwest, etc.                         | Colorado Springs, CO ..... | April 13, 2019.   |

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (Shift in Production or

Services to a Foreign Country Path or Acquisition of Articles or Services from

a Foreign Country Path) of the Trade Act have been met.

| TA-W No.     | Subject firm                                                                                                        | Location               | Impact date        |
|--------------|---------------------------------------------------------------------------------------------------------------------|------------------------|--------------------|
| 95,451 ..... | Ascena Retail Group, Inc. ....                                                                                      | Mahwah, NJ .....       | December 5, 2018.  |
| 95,458 ..... | Ebonite International, Inc., Brunswick, Staff Easy .....                                                            | Hopkinsville, KY ..... | December 6, 2018.  |
| 95,495 ..... | Dentsply Sirona, Inc., Corporate, Financial Services, JFC Global, Robert Half/Accountemps, Adecco.                  | York, PA .....         | December 18, 2018. |
| 95,509 ..... | Cognizant Technology Solutions U.S. Corp., Digital Operations, Provider Operations, Cognizant Technology Solutions. | New York, NY .....     | December 23, 2018. |
| 95,520 ..... | Castelli America LLC, Castelli American Group, Inc., Adecco .....                                                   | Ashville, NY .....     | December 23, 2018. |
| 95,535 ..... | Jones Lang Lasalle Americas, Inc., Finance-Accounting Services, Client Accounting Services, Aston Carter, etc.      | Westmont, IL .....     | January 6, 2019.   |
| 95,548 ..... | HCL America Inc .....                                                                                               | Webster, NY .....      | January 8, 2019.   |
| 95,558 ..... | Veritas Genetics, Inc .....                                                                                         | Danvers, MA .....      | January 8, 2019.   |
| 95,563 ..... | Hologic, Inc., Accounting and Financial Division, Randstad .....                                                    | Marlborough, MA .....  | January 13, 2019.  |
| 95,566 ..... | Autolite Operations LLC, FRAMAUTO Holdings LLC .....                                                                | Duncan, SC .....       | January 15, 2019.  |
| 95,594 ..... | Wipro Limited, Comcast Xfinity .....                                                                                | Englewood, CO .....    | January 22, 2019.  |
| 95,621 ..... | HCL America .....                                                                                                   | North Canton, OH ..... | January 28, 2019.  |
| 95,779 ..... | Synamedia Americas LLC, Permira .....                                                                               | Costa Mesa, CA .....   | March 5, 2019.     |
| 95,795 ..... | DST Pharmacy Solutions, Inc., SS&C Technology Holdings, Inc., Kelly Temporary Services.                             | Kansas City, MO .....  | March 5, 2019.     |
| 95,817 ..... | HCL America .....                                                                                                   | Wethersfield, CT ..... | March 16, 2019.    |
| 95,824 ..... | HCL America .....                                                                                                   | Lewisville, TX .....   | March 18, 2019.    |
| 95,864 ..... | HCL America .....                                                                                                   | Broomfield, CO .....   | April 1, 2019.     |
| 95,928 ..... | Electrolux Home Products, Inc., Freezer Division .....                                                              | Saint Cloud, MN .....  | May 21, 2019.      |
| 95,942 ..... | Pittsburgh Glass Works, LLC, Vitro Automotive Glass, Cornerstone Staffing Solutions.                                | Evart, MI .....        | May 27, 2019.      |
| 95,954 ..... | Closetmaid, LLC, Distribution Center .....                                                                          | Belle Vernon, PA ..... | May 28, 2019.      |

| TA-W No.     | Subject firm                                                                                                                    | Location              | Impact date         |
|--------------|---------------------------------------------------------------------------------------------------------------------------------|-----------------------|---------------------|
| 95,966 ..... | BT Conferencing Video, Inc., Teleconferencing Customer Support Center, Manpower.                                                | Westminster, CO ..... | June 4, 2019.       |
| 95,995 ..... | Technicolor Home Entertainment Services Southeast, LLC, Afeea Staffing, Alliance HR, Automation Personnel Services, Epsco, etc. | Huntsville, AL .....  | June 16, 2019.      |
| 96,197 ..... | TE Connectivity, Terra Staffing Group, Kelly Services, Accountemps ...                                                          | Tualatin, OR .....    | September 17, 2019. |

#### Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility

criteria for TAA have not been met for the reasons specified.

The investigation revealed that the requirements of Trade Act section 222(a)(1) and (b)(1) (significant worker

total/partial separation or threat of total/partial separation), or (e) (firms identified by the International Trade Commission), have not been met.

| TA-W No.     | Subject firm          | Location     | Impact date |
|--------------|-----------------------|--------------|-------------|
| 95,724 ..... | Joy of Life LLC ..... | Ontario, CA. |             |

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both), or (a)(2)(B) (shift in production or services to a foreign country or

acquisition of articles or services from a foreign country), (b)(2) (supplier to a firm whose workers are certified eligible to apply for TAA or downstream producer to a firm whose workers are

certified eligible to apply for TAA), and (e) (International Trade Commission) of section 222 have not been met.

| TA-W No.     | Subject firm                                                                              | Location         | Impact date |
|--------------|-------------------------------------------------------------------------------------------|------------------|-------------|
| 95,854 ..... | FLIR Surveillance, Inc., FLIR Systems, Inc., 3rd Part Software, Aerotek, Atum Group, etc. | Wilsonville, OR. |             |

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports), (a)(2)(B) (shift in production or services to a foreign country or acquisition of articles or

services from a foreign country), (b)(2) (supplier to a firm whose workers are certified eligible to apply for TAA or downstream producer to a firm whose workers are certified eligible to apply

for TAA), and (e) (International Trade Commission) of section 222 have not been met.

| TA-W No.      | Subject firm                                                                                    | Location       | Impact date |
|---------------|-------------------------------------------------------------------------------------------------|----------------|-------------|
| 95,585A ..... | Colver Power Project, Northern Star Generation Services, Attem, WorkLink Staffing, etc.         | Colver, PA.    |             |
| 95,789 .....  | Jeannette Shade & Novelty Company, Jeannette Specialty Glass, JSG Oceana LLC.                   | Jeannette, PA. |             |
| 95,946 .....  | GenOn Energy Services LLC, Dickerson Generating Plant, Allied Universal Security Services, etc. | Dickerson, MD. |             |
| 96,058 .....  | Wool Felt Products, Inc., Collegiate Pacific .....                                              | Roanoke, VA.   |             |

#### Determinations Terminating Investigations of Petitions for Trade Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and

on the Department's website, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the worker group on whose behalf the petition was filed is covered under an existing certification.

| TA-W No.     | Subject firm                                           | Location       | Impact date |
|--------------|--------------------------------------------------------|----------------|-------------|
| 95,347 ..... | Formativ Health Management .....                       | Somerset, NJ.  |             |
| 95,574 ..... | Walmart, Inc., Global Business Services Division ..... | Charlotte, NC. |             |
| 95,821 ..... | Cox Machine Inc .....                                  | Harper, KS.    |             |

I hereby certify that the aforementioned determinations were issued during the period of *October 1, 2020 through October 31, 2020*. These determinations are available on the Department's website <https://www.doleta.gov/tradeact/petitioners/>

[taa\\_search\\_form.cfm](#) under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888-365-6822.

Signed at Washington, DC, this 16th day of November 2020.

**Hope D. Kinglock,**  
Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2020-26381 Filed 11-30-20; 8:45 am]

BILLING CODE 4510-FN-P

**DEPARTMENT OF LABOR****Office of the Secretary****Agency Information Collection Activities; Submission for OMB Review; Comment Request; Fire Brigades Standard**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Occupational Safety and Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:**

Crystal Rennie by telephone at 202-693-0456, or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** OSHA does not mandate that employers establish fire brigades; however, if they do so, they must comply with certain provisions of the Standard. The Standard imposes the following paperwork requirements on each employer who establishes a fire brigade: Write an organizational statement; ascertain the fitness of workers with specific medical conditions to

participate in fire related operations; and provide appropriate training and information to fire brigade members. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 3, 2020 (85 FR 46731).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL—OSHA.

*Title of Collection:* Fire Bridges Standard.

*OMB Control Number:* 1218-0075.

*Affected Public:* Private Sector, Businesses or other for-profits.

*Total Estimated Number of Respondents:* 25,546.

*Total Estimated Number of Responses:* 3,832.

*Total Estimated Annual Time Burden:* 2,767 hours.

*Total Estimated Annual Other Costs Burden:* \$ 0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

**Crystal Rennie,**

*Acting Departmental Clearance Officer.*

[FR Doc. 2020-26517 Filed 11-30-20; 8:45 am]

**BILLING CODE 4510-26-P**

**DEPARTMENT OF LABOR****Agency Information Collection Activities; Submission for OMB Review; Comment Request; Rehabilitation Plan and Award**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Office of the Workers' Compensation Programs (OWCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with

the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:**

Anthony May by telephone at 202-693-4129 (this is not a toll-free number) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Federal Employees' Compensation Act (FECA). 33 U.S.C. 939 (LHWCA) and 5 U.S.C. 8104 and 8111 (FECA) authorize OWCP to pay for approved vocational rehabilitation services to eligible workers with work-related disabilities. In order to decide whether to approve a rehabilitation plan, OWCP must receive a copy of the plan, supporting vocational testing materials and the estimated cost to implement the plan, broken down to show the fees, supplies, tuition and worker maintenance payments that are contemplated. OWCP also must receive the signature of the rehabilitation counselor to show that the proposed plan is appropriate. Form OWCP-16 is the standard format for the collection of this information. The regulations implementing these statutes allow for the collection of information needed for OWCP to determine if a rehabilitation plan should be approved and payment



of any related expenses should be authorized. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 22, 2020 (85 FR 44327).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–OWCP.

*Title of Collection:* Rehabilitation Plan and Award.

*OMB Control Number:* 1240–0045.

*Affected Public:* Businesses or other for-profits institutions; not-for-profit institutions.

*Total Estimated Number of Respondents:* 3,176.

*Total Estimated Number of Responses:* 3,176.

*Total Estimated Annual Time Burden:* 1,588 hours.

*Total Estimated Annual Other Costs Burden:* \$0.

*Authority:* 44 U.S.C. 3507(a)(1)(D).

Dated: November 23, 2020.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2020–26385 Filed 11–30–20; 8:45 am]

**BILLING CODE 4510–CH–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Hazard Communication

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Mining Safety and Health Administration (MSHA)-sponsored information collection

request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

#### FOR FURTHER INFORMATION CONTACT:

Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811(a), authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines. Section 101(a)(7) of the Mine Act, 30 U.S.C. 811(a)(7), requires, in part, that mandatory standards prescribe the use of labels or other appropriate forms of warning as are necessary to ensure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions for safe use or exposure.

MSHA’s hazardous communications standards in 30 CFR part 47 require mine operators to evaluate the hazards of chemicals they produce or use and to provide information to miners concerning chemical hazards by means of a written hazard communication program including a list of all hazardous chemicals known at the mine, labeling containers of hazardous chemicals, providing access to Material Safety Data Sheets, and administering initial miner training. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 14, 2020 (85 FR 56636).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–MSHA.

*Title of Collection:* Hazard Communication.

*OMB Control Number:* 1219–0133.

*Affected Public:* Businesses or other for-profits institutions.

*Total Estimated Number of Respondents:* 15,584.

*Total Estimated Number of Responses:* 907,409.

*Total Estimated Annual Time Burden:* 148,235 hours.

*Total Estimated Annual Other Costs Burden:* \$9,175.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: November 23, 2020.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2020–26380 Filed 11–30–20; 8:45 am]

**BILLING CODE 4510–43–P**

**DEPARTMENT OF LABOR****Office of the Secretary****Agency Information Collection Activities; Submission for OMB Review; Comment Request; Mine Accident, Injury, and Illness Report and Quarterly Mine Employment and Coal Production Report**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Mining Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Anthony May by telephone at 202-693-4129 (this is not a toll-free number) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811, authorizes the Secretary of Labor (Secretary) to

develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines. The reporting and recordkeeping provisions in 30 CFR part 50 (Part 50), Notification, Investigation, Reports and Records of Accidents, Injuries and Illnesses, Employment and Coal Production in Mines, are essential elements in MSHA's statutory mandate to reduce work-related injuries and illnesses among the nation's miners (30 U.S.C. 801). Section 50.10 requires mine operators and independent contractors to immediately notify MSHA in the event of an accident. This immediate notification is critical to MSHA's timely investigation and assessment of the cause of the accident. Section 50.11 requires that the mine operator or independent contractor investigate each accident and occupational injury and prepare a report. The mine operator or independent contractor may not use MSHA Form 7000-1 as the investigation report, except if the operator or contractor employs fewer than 20 miners and the injury is not related to an accident. Section 50.20 requires mine operators and independent contractors to report each accident, injury, and illness to MSHA on Form 7000-1 within 10 working days after an accident or injury has occurred or an occupational illness has been diagnosed. The use of MSHA Form 7000-1 provides for uniform information gathering across the mining industry. Section 50.30 requires that all mine operators and independent contractors working on mine property report employment to MSHA quarterly on Form 7000-2, and that coal mine operators and independent contractors also report coal production. Accident, injury, and illness data, when correlated with employment and production data, provide information that MSHA uses to improve its safety and health enforcement programs, focus its education and training efforts, and establish priorities for its technical assistance activities in mine safety and health. Maintaining a current database allows MSHA to identify and direct increased attention to those mines, industry segments, and geographical areas where hazardous trends are developing. This could not be done effectively using historical data. The information collected under Part 50 is the most comprehensive and reliable occupational data available concerning the mining industry. Section 103(d) of the Mine Act mandates that each accident be investigated by the operator

to determine the cause and means of preventing a recurrence. Operators must keep records of such accidents and investigations and make them available to the Secretary or the Secretary's authorized representative and the appropriate State agency. Section 103(h) requires operators to keep any records and make any reports that are reasonably necessary for MSHA to perform its duties under the Mine Act. Section 103(j) requires operators to notify MSHA of the occurrence of an accident and to take appropriate measures to preserve any evidence that would assist in the investigation into the causes of the accident. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 14, 2020 (85 FR 56637).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL-MSHA.

*Title of Collection:* Mine Accident, Injury, and Illness Report and Quarterly Mine Employment and Coal Production Report.

*OMB Control Number:* 1219-0007.

*Affected Public:* Businesses or other for-profits institutions.

*Total Estimated Number of Respondents:* 25,067.

*Total Estimated Number of Responses:* 112,414.

*Total Estimated Annual Time Burden:* 131,631 hours.

*Total Estimated Annual Other Costs Burden:* \$2,946.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: November 23, 2020.

**Anthony May,**  
Management and Program Analyst.

[FR Doc. 2020-26384 Filed 11-30-20; 8:45 am]

**BILLING CODE 4510-43-P**

**DEPARTMENT OF LABOR****Office of the Secretary****Agency Information Collection Activities; Submission for OMB Review; Comment Request; High-Wage Components of the Labor Value Content Requirements Under the USMCA**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Wage and Hour Division (WHD)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** In accordance with section 210(b) of the United States-Mexico-Canada Agreement Implementation Act, the U.S. Department of Labor issued regulations necessary to administer the high-wage components of the labor value content requirements as set forth in section 202A of that Act (85 FR 39782, July 1, 2020). The Act

implements the United States-Mexico-Canada Agreement (USMCA). Section 202A of the Act, codified at 19 U.S.C. 4532, in part implements Article 7 of the Automotive Appendix of the USMCA. The USMCA establishes labor value content (LVC) requirements for passenger vehicles, light trucks, and heavy trucks, pursuant to which an importer can only obtain preferential tariff treatment for a covered vehicle if the covered vehicle meets certain high-wage component requirements. The Act requires importers who claim preferential tariff treatment under the USMCA for goods imported into the United States from a USMCA Country, and vehicle producers whose goods are the subject of a claim for preferential tariff treatment under the USMCA, to make, keep, and, pursuant to rules and regulations promulgated by the Secretary, render for examination and inspection records and supporting documents related to the LVC requirements. See 19 U.S.C. 1508(b)(4). The Act further grants the Secretary authority during the course of a verification to request any records relating to wages, hours, job responsibilities, or any other information in any plant or facility relied on by a producer of covered vehicles to demonstrate that the production of those vehicles meets the high-wage components of the LVC requirements. See 19 U.S.C. 4532(e)(4)(B). The Act grants authority to the Secretary to issue regulations. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 10, 2020 (85 FR 41627).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL–WHD.

*Title of Collection:* High-Wage Components of the Labor Value Content Requirements under the USMCA.

*OMB Control Number:* 1235–0032.

*Affected Public:* Businesses or other for-profits institutions.

*Total Estimated Number of Respondents:* 9,455.

*Total Estimated Number of Responses:* 5,796,460.

*Total Estimated Annual Time Burden:* 205,911 hours.

*Total Estimated Annual Other Costs Burden:* \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: November 24, 2020.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2020–26396 Filed 11–30–20; 8:45 am]

**BILLING CODE 4510–27–P**

**DEPARTMENT OF LABOR****Office of the Secretary****Agency Information Collection Activities; Submission for OMB Review; Comment Request; Annual Refiling Survey**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 31, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4)

ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:**

Anthony May by telephone at 202-693-4129 (this is not a toll-free number) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** The Quarterly Census of Employment and Wages (QCEW) program is a federal/state cooperative effort which compiles monthly employment data, quarterly wages data, and business identification information from employers subject to state Unemployment Insurance (UI) laws. These data are collected from state Quarterly Contribution Reports (QCRs) submitted to State Workforce Agencies (SWAs). The states send micro-level employment and wages data, supplemented with the names, addresses, and business identification information of these employers, to the BLS. The state data are used to create the BLS sampling frame, known as the longitudinal QCEW data. To ensure the continued accuracy of these data, the information supplied by employers must be periodically verified and updated. For this purpose, the Annual Refiling Survey (ARS) is used in conjunction with the UI tax reporting system in each state. The information collected by the ARS is used to review the existing industry code assigned to each establishment as well as the physical location of the business establishment. As a result, changes in the industrial and geographical compositions of our economy are captured in a timely manner and reflected in the BLS statistical programs. The ARS also asks employers to identify new locations in the state. If these employers meet QCEW program reporting criteria, then a Multiple Worksite Report (MWR) is sent to the employer requesting employment and wages for each worksite each quarter. Thus, the ARS is also used to identify new potential MWR-eligible employers. Office of Management and Budget clearance is being sought for a revision to the ARS. Once every three years, the SWAs survey employers that are covered by the state's UI laws to ensure that state records correctly reflect the business activities and locations of those employers. States survey approximately one-third of their businesses each year and largely take care of the entire universe of covered businesses over a three-year cycle. The selection criterion for surveying

establishments is based on the nine-digit Federal Employer Identification Number of the respondent. BLS constantly pursues a growing number of automated reporting options to reduce employer burden and costs and to take advantage of more efficient methods and procedures. Even given such actions, mailing remains an important part of the survey. The BLS developed a one-page letter rather than mailing forms for ARS solicitation. This letter explains the purpose of the ARS and provides respondents with a unique Web ID and password. Respondents are directed to the BLS online web collection system to verify or to update their geographic and industry information. Additionally, BLS staff review selected, large multi-worksite national employers rather than surveying these employers with traditional ARS forms. This central review reduces postage costs incurred by the states in sending letters or forms. It also reduces respondent burden, as the selected employers do not have to return forms either. BLS continues to use a private contractor to handle various administrative aspects of the survey to reduce the costs associated with the ARS. This initiative is called the Centralized Annual Refiling Survey (CARS). Under CARS, BLS effectively utilizes the commercial advantages related to printing and mailing large volumes of survey letters. Finally, BLS continues to make use of email addresses collected from the ARS and from the state Unemployment Insurance agencies for solicitation purposes. Use of email for solicitation reduces the overall cost of data collection. BLS will also continue to make use of email solicitation of small establishments that had been excluded from the ARS for budgetary reasons. Since collection costs for email solicitation are minimal, these respondents can continue to be added back to the ARS at little cost to the government. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 24, 2020 (85 FR 52158).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL-BLS.

*Title of Collection:* Annual Refiling Survey.

*OMB Control Number:* 1220-0032.

*Affected Public:* Businesses or other for-profits institutions; farms; not-for-profit institutions.

*Total Estimated Number of Respondents:* 1,098,000.

*Total Estimated Number of Responses:* 1,098,000.

*Total Estimated Annual Time Burden:* 116,750 hours.

*Total Estimated Annual Other Costs Burden:* \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: November 24, 2020.

**Anthony May,**

*Management and Program Analyst.*

[FR Doc. 2020-26433 Filed 11-30-20; 8:45 am]

**BILLING CODE 4510-24-P**

## NATIONAL CAPITAL PLANNING COMMISSION

### Notice of Final Adoption of and Effective Date; Federal Environment Element, Section G of the Comprehensive Plan for the National Capital

**AGENCY:** National Capital Planning Commission.

**ACTION:** Notice of final adoption of and effective date.

**SUMMARY:** The National Capital Planning Commission (NCPD) adopted the Federal Environment Element, Section G of the Comprehensive Plan for the National Capital: Federal Elements on November 5, 2020. The Element establishes policies in Section G to preserve and replace trees that are impacted by development on federal land so they contribute to the sustainability of the National Capital Region's environment. The National Capital Region includes the District of Columbia; Montgomery and Prince George's Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities within the boundaries of these counties. Section G of the Element provides the policy framework for Commission actions on plans and projects subject to Commission review.

**DATES:** The revised Element will become effective February 1, 2021.

**ADDRESSES:** The revised Element is available online for review at: <https://www.ncpc.gov/initiatives/treereplacement/>.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Free at (202) 482-7209 or [info@ncpc.gov](mailto:info@ncpc.gov).

(Authority: 40 U.S.C. 8721(e)(2))

Dated: November 25, 2020.

Anne R. Schuyler,  
General Counsel.

[FR Doc. 2020-26466 Filed 11-30-20; 8:45 am]

**BILLING CODE P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act: Notice of Agency Meeting

**TIME AND DATE:** 10:00 a.m., Wednesday, December 2, 2020.

**PLACE:** Due to the COVID-19 Pandemic, the meeting will be open to the public via live webcast only. Visit the agency's homepage ([www.ncua.gov](http://www.ncua.gov)) and access the provided webcast link.

**STATUS:** This meeting will be open to the public.

**MATTER TO BE CONSIDERED:**

1. Board Briefing, NCUA's 2021-2022 Budget.

**CONTACT PERSON FOR MORE INFORMATION:** Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703-518-6304.

Melane Conyers-Ausbrooks,  
Secretary of the Board.

[FR Doc. 2020-26554 Filed 11-27-20; 11:15 am]

**BILLING CODE 7535-01-P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2020-0001]

### Sunshine Act Meetings

**TIME AND DATE:** Weeks of November 30, December 7, 14, 21, 28, 2020, January 4, 2021.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public.

**MATTERS TO BE CONSIDERED:**

**Week of November 30, 2020**

Friday, December 4, 2020

10:00 a.m.—Meeting with Advisory Committee on Reactor Safeguards (Public Meeting) (Contact: Larry Burkhart: 301-287-3775).

**Additional Information:** Due to COVID-19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the Web address—<https://www.nrc.gov/>.

**Week of December 7, 2020—Tentative**

There are no meetings scheduled for the week of December 7, 2020.

**Week of December 14, 2020—Tentative**

There are no meetings scheduled for the week of December 14, 2020.

**Week of December 21, 2020—Tentative**

There are no meetings scheduled for the week of December 21, 2020.

**Week of December 28, 2020—Tentative**

There are no meetings scheduled for the week of December 28, 2020.

**Week of January 4, 2021—Tentative**

There are no meetings scheduled for the week of January 4, 2021.

**CONTACT PERSON FOR MORE INFORMATION:**

For more information or to verify the status of meetings, contact Denise McGovern at 301-415-0681 or via email at [Denise.McGovern@nrc.gov](mailto:Denise.McGovern@nrc.gov). The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: <https://www.nrc.gov/public-involve/public-meetings/schedule.html>.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301-287-0745, by videophone at 240-428-3217, or by email at [Anne.Silk@nrc.gov](mailto:Anne.Silk@nrc.gov). Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301-415-1969), or by email at [Tyesha.Bush@nrc.gov](mailto:Tyesha.Bush@nrc.gov).

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: November 27, 2020.

For the Nuclear Regulatory Commission.

Denise L. McGovern,  
Policy Coordinator, Office of the Secretary.

[FR Doc. 2020-26568 Filed 11-27-20; 4:15 pm]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2020-0247]

### Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License amendment request; notice of opportunity to comment, request a hearing, and petition for leave to intervene; order imposing procedures.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) received and is considering approval of three amendment requests. The amendment requests are for Waterford Steam Electric Station, Unit 3; Hope Creek Generating Station; and Sequoyah Nuclear Plant, Units 1 and 2. For each amendment request, the NRC proposes to determine that they involve no significant hazards consideration (NSHC). Because each amendment request contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation.

**DATES:** Comments must be filed by December 31, 2020. A request for a hearing or petition for leave to intervene must be filed by February 1, 2021. Any potential party as defined in section 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 December 11, 2020.

**ADDRESSES:** You may submit comments by any of the following methods however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0247. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: [Jennifer.Borges@nrc.gov](mailto: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:**

Bernadette Abeywickrama, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–4081, email: [Bernadette.Abeywickrama@nrc.gov](mailto:Bernadette.Abeywickrama@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Obtaining Information and Submitting Comments**

*A. Obtaining Information*

Please refer to Docket ID NRC–2020–0247, facility name, unit number(s), docket number(s), application date, and subject 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–2020–0247.

- *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](mailto: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.

- *Attention:* The PDR, where you may examine and purchase copies of public documents, is currently closed. You may submit your request to the PDR via email at [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m., Eastern Standard Time (EST), Monday through Friday, except Federal holidays.

*B. Submitting Comments*

The NRC encourages electronic comment submission through the Federal Rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC–2020–0247, facility name, unit number(s), docket number(s), application date, and subject 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. Background**

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the NRC is publishing this notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves (NSHC, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing SUNSI.

**III. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing**

The Commission has made a proposed determination that the following amendment requests involve NSHC. Under the Commission’s regulations in 10 CFR 50.92, this means that operation of the facilities in accordance with the proposed amendments 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. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determinations.

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 any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue any of these 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 on any of these amendments prior to the expiration of either the comment period or the notice period, it will publish a notice of issuance in the **Federal Register**. If the Commission makes a final no significant hazards consideration determination for any of these amendments, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

*A. 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 any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that 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 that 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 that 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 that, 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 petition is submitted, 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.

#### *B. 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](mailto: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. (EST) 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](mailto: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., (EST), 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.

#### Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA

|                                                      |                                                                                                                                                                                                                                     |
|------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                   | 50-382.                                                                                                                                                                                                                             |
| Application Date .....                               | July 23, 2020.                                                                                                                                                                                                                      |
| ADAMS Accession No .....                             | ML20205L588.                                                                                                                                                                                                                        |
| Location in Application of NSHC .....                | Pages 23-25 of the Enclosure.                                                                                                                                                                                                       |
| Brief Description of Amendment(s) .....              | The proposed amendment would revise multiple Waterford Steam Electric Station, Unit 3 Technical Specifications in order to implement a modification to the existing digital minicomputers of the core protection calculator system. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                               |
| Name of Attorney for Licensee, Mailing Address ..... | Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.                                                                                                        |
| NRC Project Manager, Telephone Number .....          | Audrey Klett, 301-415-0489.                                                                                                                                                                                                         |

#### PSEG Nuclear LLC; Hope Creek Generating Station; Salem County, NJ

|                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                   | 50-354.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Application Date .....                               | September 24, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| ADAMS Accession No .....                             | ML20272A063.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Location in Application of NSHC .....                | Pages 7-9 of Enclosure 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Brief Description of Amendment(s) .....              | The amendment would revise Hope Creek Generating Station (Hope Creek) Technical Specification 2.1, "SAFETY LIMITS," specifically, 2.1.1, "THERMAL POWER, Low Pressure or Low Flow," and 2.1.2, "THERMAL POWER, High Pressure and High Flow," to reduce the reactor vessel steam dome pressure value to address General Electric Nuclear Energy 10 CFR part 21 Safety Communication SC05-03, "10 CFR part 21 Reportable Condition Notification: Potential to Exceed Low Pressure Technical Specification Safety Limit," issued on March 29, 2005, regarding the potential to violate the low pressure safety limit following a pressure regulator failure—open transient for Hope Creek. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Name of Attorney for Licensee, Mailing Address ..... | Steven Fleischer, PSEG Services Corporation, 80 Park Plaza, T-5, Newark, NJ 07102.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |



|                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|-----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| NRC Project Manager, Telephone Number .....                                                   | James Kim, 301-415-4125.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>Tennessee Valley Authority; Sequoyah Nuclear Plant, Units 1 and 2; Hamilton County, TN</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Docket No(s) .....                                                                            | 50-327, 50-328.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Application Date .....                                                                        | September 23, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| ADAMS Accession No .....                                                                      | ML20267A617.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Location in Application of NSHC .....                                                         | Pages E1 55-E1 60 of Enclosure 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Brief Description of Amendment(s) .....                                                       | The proposed amendments would revise Technical Specifications (TS) to allow the use of Westinghouse RFA-2 fuel with Optimized ZIRLO™ cladding. Further, the proposed amendments would revise TS 5.6.3, "Core Operating Limits Report," to replace the loss-of-coolant accident analysis evaluation model references with the FULL SPECTRUM™ Loss-of-Coolant Accident Evaluation Model. Finally, the proposed amendments would revise the TSs to permit the use of 52 full-length control rods with no full-length control rod assembly in core location H-08. The license amendment request included a related request for exemption from the requirements of 10 CFR 50.46 and appendix K to 10 CFR part 50. That exemption request will be processed separately from this license amendment request. |
| Proposed Determination .....                                                                  | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Name of Attorney for Licensee, Mailing Address .....                                          | Sherry Quirk, Executive VP and General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 6A, Knoxville, TN 37902.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| NRC Project Manager, Telephone Number .....                                                   | Michael Wentzel, 301-415-6459.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

#### IV. Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

*Entergy Operations, Inc.; Docket No. 50-382; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA*

*PSEG Nuclear LLC; Docket No. 50-354; Hope Creek Generating Station; Salem County, NJ*

*Tennessee Valley Authority; Docket Nos. 50-327 and 50-328; Sequoyah Nuclear Plant, Units 1 and 2; Hamilton County, TN*

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 *RidsOgcMailCenter.Resource@nrc.gov*, respectively.<sup>1</sup> The request must include the following information:

(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<sup>2</sup> 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.

<sup>1</sup> While a request for hearing or petition to intervene in this proceeding must comply with the 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.

<sup>2</sup> 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.

(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.<sup>3</sup>

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: November 10, 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 <b>Federal Register</b> 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.                                                                                                                                                                                                                                                         |
| 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).                                                                                                                                                                                                                                                                                                                                                 |
| 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).                                   |
| 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. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.                                                                                                                                                                                                                                                                                                                        |
| 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. 2020-25225 Filed 11-30-20; 8:45 am]

BILLING CODE 7590-01-P

<sup>3</sup>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.

## NUCLEAR REGULATORY COMMISSION

[NRC-2018-0066]

### Dry Storage and Transportation of High Burnup Spent Nuclear Fuel

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** NUREG; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing NUREG-2224, “Dry Storage and Transportation of High Burnup Spent Nuclear Fuel.” The NUREG provides technical background information applicable to high burnup spent nuclear fuel (HBU SNF), provides an engineering assessment of recent NRC-sponsored mechanical testing of HBU SNF, and presents example approaches for licensing and certification of HBU SNF in transportation and dry storage.

**ADDRESSES:** Please refer to Docket ID NRC-2018-0066 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:*

Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: [Jennifer.Borges@nrc.gov](mailto:Jennifer.Borges@nrc.gov). Go to <https://www.regulations.gov> and search for Docket ID NRC-2018-0066. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public 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](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

**FOR FURTHER INFORMATION CONTACT:** Ricardo Torres, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555 0001; telephone: 301-415-7508, email: [Ricardo.Torres@nrc.gov](mailto:Ricardo.Torres@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

### I. Discussion

NUREG-2224, “Dry Storage and Transportation of High Burnup Spent Nuclear Fuel” (ADAMS Accession No. ML20191A321), is a technical basis document which expands on the aspects that pertain to hydride reorientation in HBU SNF cladding, as discussed in SFST-ISG-11, Revision 3, “Cladding Considerations for the Transportation and Storage of Spent Fuel” (ADAMS Accession No. ML033230335), NUREG-2215, “Standard Review Plan for Spent Fuel Dry Storage Systems and Facilities—Final Report” (ADAMS Accession No. ML20121A190), and NUREG-2216, “Standard Review Plan for Transportation Packages for Spent Fuel and Radioactive Material: Final Report” (ADAMS Accession No. ML20234A651). Hydride reorientation is a process in which the orientation of hydrides precipitated in HBU SNF cladding during reactor operation changes from the circumferential-axial to the radial-axial direction. NUREG-2224 provides an engineering assessment of the results of NRC-sponsored research (NUREG/CR-7198, Rev. 1, “Mechanical Fatigue Testing of High-Burnup Fuel for Transportation Application” ADAMS Accession No. ML17292B057) on the mechanical performance of HBU SNF following hydride reorientation. Per the conclusions of that assessment, NUREG-2224 presents example approaches for licensing and certification of HBU SNF for transportation (under part 71 of title 10 of the *Code of Federal Regulations* (10 CFR), “Packaging and Transportation of Radioactive Material”) and dry storage (under 10 CFR part 72, “Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste”).

### II. Additional Information

On August 9, 2018 (83 FR 39475), the NRC solicited comments on draft NUREG-2224, “Dry Storage and Transportation of High Burnup Spent Nuclear Fuel.” The initial public comment period closed on September 24, 2018. Responding to several requests from the public, the NRC reopened the public comment period on October 10, 2018 (83 FR 50965), to allow more time for members of the public to develop and submit their comments. The staff considered public comments received on the draft document in preparing the final NUREG-2224. A summary of the public comments and staff responses are available in ADAMS under Accession No. ML20120A444.

### III. Regulatory Analysis

The NRC prepared a regulatory analysis on this action. The analysis examines the costs and benefits of the alternatives considered by the NRC. The regulatory analysis is available at ADAMS Accession No. ML20188A027.

### IV. Backfitting, Forward Fitting, and Issue Finality Provisions

This NUREG (NUREG-2224) sets forth the NRC's position regarding acceptable approaches for demonstrating regulatory compliance in applications for dry storage cask Certificates of Compliance (CoCs), CoCs for transportation packages, and specific licenses for Independent Spent Fuel Storage Installations (ISFSIs) involving HBU SNF. The issuance of this NUREG would not constitute backfitting as defined in the backfitting provisions in 10 CFR 72.62 and would not implicate forward fitting as described in Management Directive (MD) 8.4, “Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,” for specific ISFSI licensees. Dry storage cask CoCs do not fall within the backfitting provision in 10 CFR 72.62, and there are no backfitting provisions in 10 CFR part 71 regarding CoCs for transportation packages. Issuance of the NUREG would also not constitute backfitting or forward fitting under 10 CFR 50.109 or MD 8.4, or otherwise be inconsistent with issue finality provisions in 10 CFR part 52, that are applicable to general ISFSI licensees. The NRC's position is based upon the following considerations.

1. The NUREG does not constitute backfitting or forward fitting or affect issue finality. The NUREG provides licensing and certification approaches acceptable to the NRC staff for demonstrating regulatory compliance in applications for dry storage cask CoCs, CoCs for transportation packages, and specific ISFSI licenses involving HBU SNF. Changes in staff guidance, without further NRC action, are not matters that meet the definition of backfitting or forward fitting or affect the issue finality of a 10 CFR part 52 approval.

2. Current or future applicants who may use this guidance in developing acceptable approaches for demonstrating regulatory compliance in applications for dry storage cask CoCs, CoCs for transportation packages, and specific ISFSI licenses involving HBU SNF in the future are not—with limited exceptions not applicable here—within

the scope of the backfitting and issue finality regulations. Applicants are not, with certain exceptions, covered by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. This is because neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions not applicable here—were intended to apply to every NRC action which substantially changes the expectations of current and future applicants. If, in the future, the staff seeks to impose a position in the NUREG in a manner that constitutes backfitting or does not provide issue finality as described in the applicable issue finality provision, then the staff would need to address the Backfit Rule or the criteria for avoiding issue finality as described in the applicable issue finality provision.

3. The staff does not, at this time, intend to impose the positions represented in the NUREG in a manner that would constitute forward fitting. If, in the future, the staff seeks to impose a position in the NUREG in a manner that constitutes forward fitting, then the staff would need to address the forward fitting criteria in MD 8.4.

#### V. Congressional Review Act

This NUREG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

Dated: November 25, 2020.

For the Nuclear Regulatory Commission.

**Christopher M. Regan,**

*Deputy Director, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2020–26516 Filed 11–30–20; 8:45 am]

**BILLING CODE 7590–01–P**

#### NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7005; NRC–2020–0209]

#### Waste Control Specialists LLC

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Environmental assessment and finding of no significant impact; issuance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and finding of no significant impact (FONSI) in support of the NRC's consideration of a request from Waste Control Specialists LLC (WCS) to continue to store

transuranic waste that originated from the Los Alamos National Laboratory (LANL) without an NRC license under the terms of a 2014 order. The 2014 order exempted WCS from the NRC's regulations concerning special nuclear material (SNM). The current action is in response to a request by WCS dated August 24, 2020, to extend the possession time to temporarily store certain waste at specific locations at the WCS Site until December 23, 2022.

**DATES:** The EA and FONSI referenced in this document are available on December 1, 2020.

**ADDRESSES:** Please refer to Docket ID NRC–2020–0209 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–2020–0209. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: [Jennifer.Borges@nrc.gov](mailto:Jennifer.Borges@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *The 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](mailto: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.

- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

#### FOR FURTHER INFORMATION CONTACT:

Harry Felsher, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6559; email: [Harry.Felsher@nrc.gov](mailto:Harry.Felsher@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

Waste Control Specialists LLC operates a facility in Andrews County, Texas (the WCS Site), that is licensed to process and store certain types of radioactive material contained in low-level waste (LLW) and mixed waste. The WCS Site is also licensed to dispose of radioactive, hazardous, and toxic waste. Under an Agreement authorized by the Atomic Energy Act of 1954, as amended, a State can assume regulatory authority over radioactive material. In 1963, Texas entered into such an Agreement and assumed regulatory authority over source material, byproduct material, and SNM under critical mass. The WCS Site is licensed by the Texas Commission on Environmental Quality (TCEQ) for possession, treatment, and storage of radioactive waste and disposal of LLW under Radioactive Materials License (RML) R04100.

Section 70.3 of title 10 of the *Code of Federal Regulations* (10 CFR) requires persons who own, acquire, deliver, receive, possess, use, or transfer SNM to obtain a license pursuant to the requirements of 10 CFR part 70. The licensing requirements in 10 CFR part 70 apply to persons in Agreement States possessing greater than critical mass quantities, as defined in 10 CFR 150.11. However, pursuant to 10 CFR 70.17(a), “the Commission may grant such exemptions from the requirements of the regulations in this part 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.”

On September 25, 2000, WCS first requested an exemption from the licensing requirements in 10 CFR part 70 (ADAMS Accession No. ML003759584). On November 21, 2001, the NRC issued an order to WCS (2001 Order) granting an exemption to WCS from certain NRC regulations and permitted WCS, under specified conditions, to possess waste containing SNM in greater quantities than specified in 10 CFR part 150, at the WCS storage and treatment facility on the WCS Site in Andrews County, Texas, without obtaining an NRC license pursuant to 10 CFR part 70. The 2001 Order was published in the **Federal Register** on November 15, 2001 (66 FR 57489). The NRC issued superseding Orders to WCS in 2004 (*i.e.*, modified list of reagents) and 2009 (*i.e.*, modified sampling requirements) that modified the conditions in the 2001 Order.

On February 14, 2014, a radiation release event occurred at the U.S. Department of Energy (DOE) Waste Isolation Pilot Plant (WIPP) Facility

(WIPP incident). In response, the DOE suspended operations at the WIPP Facility. In April 2014, WCS began receiving some specific waste from DOE that both WCS and DOE understood to meet both the U.S. Department of Transportation (DOT) shipping requirements and the conditions in the 2009 Order. WCS began storing that waste at the Treatment, Storage, and Disposal Facility (TSDF), identified as the storage and processing facility in RML R04100. The waste was DOE transuranic waste that originated at LANL that was destined to be disposed of at the DOE WIPP Facility (i.e., “LANL Waste”). In June 2014, WCS received information from DOE that some of the LANL Waste being temporarily stored at the TSDF may be similar to the waste that might be the cause of the WIPP Incident. In response, WCS moved some of the LANL Waste from the TSDF to the Federal Waste Facility (FWF) disposal cell for temporary storage.

By letter dated July 18, 2014, WCS requested an exemption from the NRC’s regulations to possess SNM in excess of the critical mass limits specified in 10 CFR 150.11 while temporarily storing some LANL Waste in the FWF disposal cell. The NRC issued a new order to WCS on December 3, 2014 (2014 Order) that superseded the 2009 Order. The 2014 Order was published in the **Federal Register** on December 11, 2014 (79 FR 73647). The 2014 Order added new conditions, primarily related to the temporary storage of the LANL Waste both at the TSDF and in the FWF disposal cell. The State of Texas incorporated the 2014 Order Conditions into WCS’ (TCEQ-issued license) RML R04100.

By letters dated March 28, 2016, and August 30, 2018, (ADAMS Accession Nos. ML16095A361 and ML18250A289), WCS requested the modification of Condition 8.B.4 of the 2014 Order to extend the timeframe for temporarily allowing storage of the LANL Waste at the WCS Site from “two years” to “until December 23, 2018” and “until December 23, 2020.” By letters dated September 23, 2016, and December 19, 2018, (ADAMS Accession Nos. ML16097A265 and ML18269A318), the NRC approved modifications of the 2014 Order Condition 8.B.4, extending WCS’ authorization to store the LANL Waste at the WCS Site without a license under 10 CFR part 70 to “until December 23, 2018,” and subsequently “until December 23, 2020” by citing the closed status of operations at the WIPP Facility in 2016 and the safe temporary storage status of the LANL Waste at the TSDF

and in the FWF disposal cell in both 2016 and 2018.

By letter dated August 24, 2020, WCS requested that the effectiveness of its exemption from NRC requirements in 10 CFR part 70 be extended with the modification of Condition 8.B.4 of the 2014 Order to extend the timeframe for temporarily allowing storage of the LANL Waste at the WCS Site for another two years, to “until December 23, 2022.” That proposal is the subject of this Environmental Assessment.

## II. Environmental Assessment

### *Description of the Proposed Action*

The proposed action is the WCS request to modify the 2014 Order Condition 8.B.4. to allow WCS to continue to store the LANL Waste at specific locations at the WCS Site for an additional two years, until December 23, 2022, without an NRC license.

### *Need for the Proposed Action*

WCS is making this request to continue to store the LANL Waste while the DOE-led Interagency Project Team (including WCS, DOE, EPA, NRC, the State of Texas, and the State of New Mexico) works to recommend a path forward for disposition of the LANL Waste. While the WIPP Facility has resumed operations, some of the LANL Waste at the WCS Site cannot be shipped off the WCS Site at this time because it does not meet DOT shipping requirements. WCS has indicated that it will not be able to ship the LANL Waste to another appropriate location by the timeframe specified in the 2014 Order Condition 8.B.4, as modified by the NRC letter dated December 19, 2018. The purpose of this EA is to assess the potential environmental impacts of the WCS request to modify the 2014 Order Condition 8.B.4. to allow WCS to store the LANL Waste at specific locations at the WCS Site for additional two years, until December 23, 2022. This EA does not approve or deny the requested action.

### *Environmental Impacts of the Proposed Action*

The NRC does not expect changes in radiation hazards to workers or to the environment. WCS will continue to ensure that the LANL Waste in both the FWF disposal cell and the TSDF remain stored safely and securely, and will notify the NRC of any events as appropriate, as set out in the 2014 Order. No changes to its handling or associated hazards would occur as a result of granting the requested change. Other environmental impacts would be the same as evaluated in the EA that

supported the 2014 Order, as applicable to the activities associated with the continued safe storage of the LANL Waste.

### *Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the NRC staff could deny the WCS request and therefore, not issue a modification to the Order Condition 8.B.4. that would authorize continued storage of the LANL Waste at the WCS Site (i.e., the “no action” alternative). Upon expiration of the timeframe in the 2014 Order Condition 8.B.4., as modified by the December 19, 2018, NRC letter to WCS, WCS would still be required to maintain the material safely. In addition, the NRC authorization of any change to the current storage of the LANL Waste at the WCS Site would still be required and WCS has submitted no such proposal to the NRC. As a result, under this alternative, there would be no environmental impacts different from the proposed action, although WCS would be required to secure a license or other regulatory authorization for the storage of the material or potentially be in violation of 10 CFR part 70 upon the expiration of the term in the 2014 Order Condition 8.B.4.

Thus, the “no action” alternative would not result in changes to the environmental impacts evaluated in the NRC’s prior EAs that supported the 2014 Order or the previous NRC orders. Those prior EAs concluded that there would be no significant radiological or non-radiological environmental impacts associated with the storage of SNM at the WCS Site, consistent with the conditions in those NRC Orders.

### *Agencies and Persons Consulted*

On November 9, 2020, the staff consulted with TCEQ by providing a draft of the EA for review and comment. By email dated November 13, 2020 (ADAMS Accession No. ML20321A189), TCEQ provided comments on and recommended corrections to the draft EA. The NRC staff modified the EA to appropriately address the TCEQ comments and recommended corrections.

The proposed action does not involve the development or disturbance of additional land. Hence, the NRC has determined that the proposed action will not affect listed endangered or threatened species or their critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. Likewise, the NRC staff has determined that the proposed action does not have the potential to adversely affect cultural

resources because no ground disturbing activities are associated with the proposed action. Therefore, no consultation is required under Section 106 of the National Historic Preservation Act.

### III. Finding of No Significant Impact

The NRC has reviewed the WCS August 24, 2020, request to supplement the 2014 Order again to extend the possession time of the LANL Waste at specific locations at the WCS Site. The NRC has found that effluent releases and potential radiological doses to the public are not anticipated to change as a result of this action and that occupational exposures are expected to remain within regulatory limits and as low as reasonably achievable. On the basis of this environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

Dated: November 24, 2020.

For the Nuclear Regulatory Commission.

**Patricia K. Holahan,**

*Director, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2020-26427 Filed 11-30-20; 8:45 am]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2020-0259]

### Monthly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Monthly notice.

**SUMMARY:** Pursuant to section 189.a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular monthly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration (NSHC), notwithstanding

the pendency before the Commission of a request for a hearing from any person. This monthly notice includes all amendments issued, or proposed to be issued, from October 16, 2020, to November 12, 2020. The last notice was published on November 3, 2020.

**DATES:** Comments must be filed by December 31, 2020. A request for a hearing or a petition for leave to intervene must be filed by February 1, 2021.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0259. Address questions about NRC Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: [Jennifer.Borges@nrc.gov](mailto: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:

Shirley Rohrer, Office of Nuclear Reactor Regulation, telephone: 301-415-5411, email: [Shirley.Rohrer@nrc.gov](mailto:Shirley.Rohrer@nrc.gov), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

#### SUPPLEMENTARY INFORMATION:

##### I. Obtaining Information and Submitting Comments

###### A. Obtaining Information

Please refer to Docket ID NRC-2020-0259, facility name, unit number(s), docket number(s), application date, and subject 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-2020-0259.
- *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](mailto: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 the **SUPPLEMENTARY INFORMATION** section.

- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

###### B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC-2020-0259, facility name, unit number(s), docket number(s), application date, and subject, 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. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown below, the Commission finds that the licensees' analyses provided, consistent with title 10 of the *Code of Federal Regulations* (10 CFR) section 50.91, are sufficient to support the proposed determinations that these amendment requests involve NSHC.

Under the Commission's regulations in 10 CFR 50.92, operation of the facilities in accordance with the proposed amendments 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.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determinations.

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 any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue any of these 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 on any of these amendments 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 NSHC determination for any of these amendments, any hearing will take place after issuance. The Commission expects that the need to take action on any amendment before 60 days have elapsed will occur very infrequently.

#### *A. 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 any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that 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 that 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 that 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 that, 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 petition is submitted, 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.

#### *B. 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](mailto: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](mailto: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.

The table below provides the plant name, docket number, date of application, ADAMS accession number, and location in the application of the licensees' proposed NSHC determinations. For further details with respect to these license amendment applications, see the applications for amendment, which are available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the "Obtaining Information and Submitting Comments" section of this document.



## LICENSE AMENDMENT REQUEST(S)

**Arizona Public Service Company, et al; Palo Verde Nuclear Generating Station, Units 1, 2, and 3; Maricopa County, AZ**

|                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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| Docket No(s) .....                                   | 50-528, 50-529, 50-530.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Application date .....                               | October 8, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| ADAMS Accession No .....                             | ML20282A953.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Location in Application of NSHC .....                | Pages 2-4 of the Enclosure.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....              | The proposed amendments would revise the Technical Specifications (TSs) to adopt Technical Specifications Task Force (TSTF) Traveler TSTF-501, "Relocate Stored Fuel Oil and Lube Oil Volume Values to Licensee Control," Revision 1 (ADAMS Accession Nos. ML090510686 and ML100850094), for Palo Verde Nuclear Generating Station, Units 1, 2, and 3 (Palo Verde). The amendments would revise Palo Verde TS 3.8.3, "Diesel Fuel Oil, Lube Oil, and Starting Air," by removing the current stored diesel fuel oil and lube oil numerical volume requirements from the TSs. The TSs would be modified so that the stored diesel fuel oil and lube oil inventory would require that a 7-day supply be available for each diesel generator. Conditions A and B in the Action table of TS 3.8.3 and Surveillance Requirements 3.8.3.1 and 3.8.3.2 would be revised to reflect the above change. This change is consistent with TSTF-501, Revision 1. The availability of this TS improvement was announced in the <b>Federal Register</b> on May 26, 2010 (75 FR 29588), as part of the consolidated line item improvement process. The proposed change is also consistent with an NRC clarification letter to the TSTF dated April 3, 2014 (ADAMS Accession No. ML14084A512). |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Name of Attorney for Licensee, Mailing Address ..... | Michael G. Green, Associate General Counsel, Nuclear and Environmental, Pinnacle West Capital Corporation, P.O. Box 52034, MS 7602, Phoenix, AZ 85072-2034.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| NRC Project Manager, Telephone Number .....          | Siva Lingam, 301-415-1564.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

**Duke Energy Progress, LLC; Brunswick Steam Electric Plant, Units 1 and 2; Brunswick County, NC**

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| Docket No(s) .....                                   | 50-324, 50-325.                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Application date .....                               | September 24, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                  |
| ADAMS Accession No .....                             | ML20272A091.                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Location in Application of NSHC .....                | Page 5 of Enclosure 1.                                                                                                                                                                                                                                                                                                                                                                                                               |
| Brief Description of Amendment(s) .....              | The amendment would adopt Technical Specification Task Force (TSTF) Traveler TSTF-582, "Reactor Pressure Vessel Water Inventory Control (RPV WIC) Enhancements." The Technical Specifications related to RPV WIC are revised to incorporate operating experience and to correct errors and omissions that were incorporated into the plant TS when adopting TSTF-542, Revision 2, "Reactor Pressure Vessel Water Inventory Control." |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Name of Attorney for Licensee, Mailing Address ..... | Kathryn B. Nolan, Deputy General Counsel, Duke Energy Corporation, 550 South Tryon Street (DEC45A), Charlotte, NC 28202.                                                                                                                                                                                                                                                                                                             |
| NRC Project Manager, Telephone Number .....          | Andrew Hon, 301-415-8480.                                                                                                                                                                                                                                                                                                                                                                                                            |

**Energy Harbor Nuclear Corp. and Energy Harbor Nuclear Generation LLC; Beaver Valley Power Station, Units 1 and 2; Beaver County, PA**

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| Docket No(s) .....                                   | 50-334, 50-412.                                                                                                                                                                                                                                                                                                                        |
| Application date .....                               | October 13, 2020.                                                                                                                                                                                                                                                                                                                      |
| ADAMS Accession No .....                             | ML20288A444.                                                                                                                                                                                                                                                                                                                           |
| Location in Application of NSHC .....                | Pages 10-12 of the Enclosure.                                                                                                                                                                                                                                                                                                          |
| Brief Description of Amendment(s) .....              | The proposed amendments would correct non-conservative Technical Specification 3.7.4, "Atmospheric Dump Valves (ADVs)," by increasing the number of required operable Unit No. 1 atmospheric dump valve lines from three to four to ensure equipment operability requirements are consistent with plant operation and safety analyses. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                  |
| Name of Attorney for Licensee, Mailing Address ..... | Rick Giannantonio, General Counsel, Energy Harbor Nuclear Corp., Mail Stop A-GO-15, 76 South Main Street, Akron, OH 44308.                                                                                                                                                                                                             |
| NRC Project Manager, Telephone Number .....          | Jennifer Tobin, 301-415-2328.                                                                                                                                                                                                                                                                                                          |

**Energy Northwest; Columbia Generating Station; Benton County, WA**

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| Docket No(s) .....                                   | 50-397.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Application date .....                               | September 24, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| ADAMS Accession No .....                             | ML20268B348.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Location in Application of NSHC .....                | Pages 6-9 of the Enclosure.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....              | The proposed amendment would revise technical specifications (TSs) to adopt Technical Specifications Task Force (TSTF)-582, "RPV [Reactor Pressure Vessel] WIC [Water Inventory Control] Enhancements." The TSs related to RPV WIC would be revised to incorporate operating experience and to correct errors and omissions in TSTF-542, Revision 2, "Reactor Pressure Vessel Water Inventory Control." Additionally, the proposed amendment would remove an expired note associated with the completion time of Required Action 3.5.1.A.1. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Name of Attorney for Licensee, Mailing Address ..... | Kathleen Galioto, Assistant General Counsel, Energy Northwest, MD PE13, P.O. Box 968, Richland, WA 99352.                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| NRC Project Manager, Telephone Number .....          | Maresh Chawla, 301-415-8371.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

**Entergy Operations, Inc.; Arkansas Nuclear One, Unit 2; Pope County, AR**

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| Docket No(s) .....                      | 50-368.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Application date .....                  | August 25, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| ADAMS Accession No .....                | ML20238C004.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Location in Application of NSHC .....   | Pages 19-20 of the Enclosure.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Brief Description of Amendment(s) ..... | The proposed amendment would modify the Arkansas Nuclear One, Unit 2 (ANO-2) Renewed Facility Operating License NPF-6 Technical Specifications (TSs). Specifically, the proposed amendment would modify the loss of voltage relay allowable values contained in ANO-2 TS 3.3.2.1, "Engineered Safety Feature Actuation System Instrumentation," Table 3.3-4, Functional Unit 7.a, "4.16 kv [kilovolt] Emergency Bus Undervoltage." The proposed amendment would also correct an error in Table 3.3-3 of ANO-2 TS 3.3.2.1. |

## LICENSE AMENDMENT REQUEST(s)—Continued

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| Proposed Determination .....                         | NSHC.                                                                                                                        |
| Name of Attorney for Licensee, Mailing Address ..... | Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue, NW Suite 200 East, Washington, DC 20001. |
| NRC Project Manager, Telephone Number .....          | Thomas Wengert, 301-415-4037.                                                                                                |

**Entergy Operations, Inc.; Arkansas Nuclear One, Unit 2; Pope County, AR**

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| Docket No(s) .....                                   | 50-368.                                                                                                                                                                                                                                                                                                                                                     |
| Application date .....                               | September 24, 2020.                                                                                                                                                                                                                                                                                                                                         |
| ADAMS Accession No .....                             | ML20268B898.                                                                                                                                                                                                                                                                                                                                                |
| Location in Application of NSHC .....                | Pages 3-4 of the Enclosure.                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....              | The proposed amendment would adopt Technical Specifications Task Force (TSTF) Traveler TSTF-569, "Revise Response Time Testing Definition," into the Arkansas Nuclear One, Unit 2 Technical Specifications (TSs). The proposed amendment would revise the TS Definitions for Engineered Safety Feature Response Time and Reactor Trip System Response Time. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                       |
| Name of Attorney for Licensee, Mailing Address ..... | Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue, NW, Suite 200 East, Washington, DC 20001.                                                                                                                                                                                                                               |
| NRC Project Manager, Telephone Number .....          | Thomas Wengert, 301-415-4037.                                                                                                                                                                                                                                                                                                                               |

**Exelon Generation Company, LLC; Byron Station, Unit Nos. 1 and 2; Ogle County, IL**

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| Docket No(s) .....                                   | 50-454, 50-455.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Application date .....                               | September 24, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| ADAMS Accession No .....                             | ML20269A401.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Location in Application of NSHC .....                | Pages 15-17 of Attachment 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Brief Description of Amendment(s) .....              | The amendments would change the organization, staffing, and training requirements contained in Section 5.0, "Administrative Controls," of the technical specifications for use when the units are permanently defueled and defines two new positions for Certified Fuel Handler and Non-Certified Operator in Section 1.1, "Definitions." The proposed amendments also support implementation of the Certified Fuel Handler Training and Retraining Program that was submitted to the NRC on September 24, 2020 (ADAMS Accession No. ML20269A233). |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Name of Attorney for Licensee, Mailing Address ..... | Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.                                                                                                                                                                                                                                                                                                                                                                                                                               |
| NRC Project Manager, Telephone Number .....          | Joel Wiebe, 301-415-6606.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

**Exelon Generation Company, LLC; LaSalle County Station, Units 1 and 2; LaSalle County, IL**

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| Docket No(s) .....                                   | 50-373, 50-374.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Application date .....                               | July 17, 2020, as supplemented by letters dated September 11, 2020, and October 22, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| ADAMS Accession No .....                             | ML20204A775, ML20259A454, and ML20296A616.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Location in Application of NSHC .....                | Pages 11-14 of Attachment 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Brief Description of Amendment(s) .....              | The proposed amendment would modify technical specifications (TS) requirements in TS 3.7.3, "Ultimate Heat Sink (UHS)," as follows: (1) TS 3.7.3, Condition A, would be modified to remove reference to UHS bottom elevation limit; (2) TS 3.7.3, Condition B, would be deleted; (3) TS Figure 3.7.3-1 diurnal curve would be modified; (4) Surveillance Requirement (SR) 3.7.3.1 would be modified to correct a discrepancy in the TS and allow proper application of TS 3.7.3; (5) Sedimentation Level in SR 3.7.3.2 would be modified from 18 inches to 6 inches; and (6) SR 3.7.3.3 would be deleted. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Name of Attorney for Licensee, Mailing Address ..... | Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| NRC Project Manager, Telephone Number .....          | Bhalchandra Vaidya, 301-415-3308.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

**Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2; Montgomery County, PA**

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| Docket No(s) .....                                   | 50-352, 50-353.                                                                                                                                                                                                                                                                                                                                                                                   |
| Application date .....                               | September 29, 2020.                                                                                                                                                                                                                                                                                                                                                                               |
| ADAMS Accession No .....                             | ML20273A215.                                                                                                                                                                                                                                                                                                                                                                                      |
| Location in Application of NSHC .....                | Pages 7-9 of Attachment 1.                                                                                                                                                                                                                                                                                                                                                                        |
| Brief Description of Amendment(s) .....              | The proposed amendments would revise Technical Specifications 1.0, "Definitions"; 3.4.4.6, "Pressure/Temperature Limits"; and 6.0, "Administrative Controls," by replacing the existing reactor vessel heatup and cooldown rate limits and the pressure and temperature limit curves with references to the Pressure and Temperature Limits Report at Limerick Generating Station, Units 1 and 2. |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                             |
| Name of Attorney for Licensee, Mailing Address ..... | Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.                                                                                                                                                                                                                                                                              |
| NRC Project Manager, Telephone Number .....          | V. Sreenivas, 301-415-2597.                                                                                                                                                                                                                                                                                                                                                                       |

**PSEG Nuclear LLC; Hope Creek Generating Station; Salem County, NJ; PSEG Nuclear LLC; Salem Nuclear Generating Station, Unit No. 1; Salem County, NJ**

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| Docket No(s) .....                                   | 50-354.                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Application date .....                               | September 29, 2020.                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                             | ML20274A097.                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Location in Application of NSHC .....                | Pages 5-7 of Attachment 1.                                                                                                                                                                                                                                                                                                                                                                                                       |
| Brief Description of Amendment(s) .....              | The amendment would adopt Technical Specifications Task Force (TSTF) Traveler TSTF-582, "RPV [Reactor Pressure Vessel] WIC [Water Inventory Control] Enhancements." The technical specifications related to reactor pressure vessel water inventory control would be revised to incorporate operating experience and to correct errors and omissions in TSTF-542, Revision 2, "Reactor Pressure Vessel Water Inventory Control." |
| Proposed Determination .....                         | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Name of Attorney for Licensee, Mailing Address ..... | Steven Fleischer, PSEG Services Corporation, 80 Park Plaza, T-5, Newark, NJ 07102.                                                                                                                                                                                                                                                                                                                                               |

## LICENSE AMENDMENT REQUEST(s)—Continued

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| NRC Project Manager, Telephone Number .....                                                                                                                              | James Kim, 301-415-4125.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>R.E. Ginna Nuclear Power Plant, LLC and Exelon Generation Company, LLC; R. E. Ginna Nuclear Power Plant; Wayne County, NY</b>                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Docket No(s) .....                                                                                                                                                       | 50-244.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Application date .....                                                                                                                                                   | September 21, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| ADAMS Accession No .....                                                                                                                                                 | ML20265A198.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Location in Application of NSHC .....                                                                                                                                    | Section 4.3 of the Enclosure (no page numbers available).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Brief Description of Amendment(s) .....                                                                                                                                  | The amendment would change the Technical Specification 5.5.8, "Steam Generator (SG) Program," required steam generator tube inspection frequency. This would be a one-time change to modify the steam generator inspection frequency from the current wording: "No steam generator shall operate more than 72 effective full power months or three refueling outages (whichever is less) without being inspected" to add the phrase "with the exception that each steam generator is to be inspected during the fourth refueling outage, in G1R44, following inspections that were completed in refueling outage G1R40." |
| Proposed Determination .....                                                                                                                                             | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Name of Attorney for Licensee, Mailing Address .....                                                                                                                     | Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| NRC Project Manager, Telephone Number .....                                                                                                                              | V. Sreenivas, 301-415-2597.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>Tennessee Valley Authority; Watts Bar Nuclear Plant, Unit 2; Rhea County, TN; Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Docket No(s) .....                                                                                                                                                       | 50-390, 50-391.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Application date .....                                                                                                                                                   | August 27, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| ADAMS Accession No .....                                                                                                                                                 | ML20244A303.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Location in Application of NSHC .....                                                                                                                                    | Page 13 of the Enclosure.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Brief Description of Amendment(s) .....                                                                                                                                  | The proposed amendments would revise Watts Bar Nuclear Plant, Units 1 and 2 Technical Specification 3.3.2, "ESFAS Instrumentation [engineered safety feature actuation system]," Table 3.3.2-1, to include the electric motor-driven standby main feedwater pump trip channel for the auxiliary feedwater auto-start logic and would add a new surveillance requirement.                                                                                                                                                                                                                                                 |
| Proposed Determination .....                                                                                                                                             | NSHC.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Name of Attorney for Licensee, Mailing Address .....                                                                                                                     | Sherry Quirk, Executive VP and General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 6A, Knoxville, TN 37902.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| NRC Project Manager, Telephone Number .....                                                                                                                              | Kimberly Green, 301-415-1627.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

### III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last monthly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating

license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated in the safety evaluation for each amendment.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has

made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to each action, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the table below. The safety evaluation will provide the ADAMS accession numbers for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the "Obtaining Information and Submitting Comments" section of this document.

### LICENSE AMENDMENT ISSUANCE(s)

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| <b>Dominion Nuclear Connecticut, Inc.; Millstone Power Station, Unit No. 2; New London County, CT</b>    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Docket No(s) .....                                                                                       | 50-336.                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Amendment Date .....                                                                                     | September 29, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| ADAMS Accession No .....                                                                                 | ML20237H995.                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Amendment No(s) .....                                                                                    | 341.                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Brief Description of Amendment(s) .....                                                                  | The amendment revised Millstone Power Station, Unit No. 2, Technical Specification 6.25, "Pre-Stressed Concrete Containment Tendon Surveillance Program," to replace the reference to Regulatory Guide 1.35 with a reference to Section XI, Subsection IWL of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code. Additionally, the amendment deleted the provisions of Surveillance Requirement 4.0.2 in Technical Specification 6.25. |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                   | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Duke Energy Progress, LLC; H. B. Robinson Steam Electric Plant, Unit No. 2; Darlington County, SC</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Docket No(s) .....                                                                                       | 50-261.                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Amendment Date .....                                                                                     | August 21, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| ADAMS Accession No .....                                                                                 | ML20093J098.                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

## LICENSE AMENDMENT ISSUANCE(s)—Continued

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| Amendment No(s) .....                                  | 269.                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Brief Description of Amendment(s) .....                | This amendment modified Technical Specification (TS) 3.7.3, "Main Feedwater Isolation Valves, Main Feedwater Regulation Valves, and Bypass Valves," to incorporate three new feedwater bypass isolation valves. This TS 3.7.3 change also revised the completion time for Required Action C.1 for an inoperable bypass valve to reflect the redundancy added to the configuration and to align with NUREG-1431, "Standard Technical Specifications, Westinghouse Plants." |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

**Duke Energy Progress, LLC; Shearon Harris Nuclear Power Plant, Unit 1; Wake and Chatham Counties, NC**

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|--------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50-400.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Amendment Date .....                                   | September 29, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| ADAMS Accession No .....                               | ML20212L594.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Amendment No(s) .....                                  | 179.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....                | The amendment revised Technical Specification (TS) 2.1.1.a to add the departure from nucleate boiling ratio safety limit associated with the transition from the high thermal performance fuel to a fuel assembly design with characteristics similar to the GAIA fuel design using the ORFEO-GAIA correlation methodology. The amendment also added Appendix J for DPC-NE-2005-P, "Thermal-Hydraulic Statistical Core Design Methodology," to address the applicability of the ORFEO-GAIA critical heat flux correlation methodology to a fuel assembly design with characteristics similar to the GAIA fuel design at Shearon Harris. The TSs also were revised with minor formatting editorial adjustments to the impacted pages. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

**Energy Harbor Nuclear Corp. and Energy Harbor Nuclear Generation LLC; Davis-Besse Nuclear Power Station, Unit 1; Ottawa County, OH**

|                                                        |                                                                                                                                                                                                                                                                                                                                                                             |
|--------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50-346.                                                                                                                                                                                                                                                                                                                                                                     |
| Amendment Date .....                                   | November 3, 2020.                                                                                                                                                                                                                                                                                                                                                           |
| ADAMS Accession No .....                               | ML20280A827.                                                                                                                                                                                                                                                                                                                                                                |
| Amendment No(s) .....                                  | 301.                                                                                                                                                                                                                                                                                                                                                                        |
| Brief Description of Amendment(s) .....                | The amendment revised the Davis-Besse technical specifications by relocating specific surveillance frequencies to a licensee-controlled program. The changes are based on Technical Specifications Task Force (TSTF) Traveler TSTF-425, Revision 3, "Relocate Surveillance Frequencies to Licensee Control—RITSTF Initiative 5b" (ADAMS Package Accession No. ML090850642). |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                         |

**Entergy Operations, Inc.; Arkansas Nuclear One, Unit 2; Pope County, AR**

|                                                        |                                                                                                                                                                                                                                                                                                                                                                                                 |
|--------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50-368.                                                                                                                                                                                                                                                                                                                                                                                         |
| Amendment Date .....                                   | October 30, 2020.                                                                                                                                                                                                                                                                                                                                                                               |
| ADAMS Accession No .....                               | ML20240A280.                                                                                                                                                                                                                                                                                                                                                                                    |
| Amendment No(s) .....                                  | 322.                                                                                                                                                                                                                                                                                                                                                                                            |
| Brief Description of Amendment(s) .....                | The amendment modified multiple technical specifications (TSs) for Arkansas Nuclear One, Unit 2, to address non-conservative TS Applicability statements associated with the movement of fuel assemblies. The amendment also modified these TSs and related TSs to gain greater consistency with NUREG-1432, Revision 4, "Standard Technical Specifications for Combustion Engineering Plants." |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                                             |

**Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA**

|                                                        |                                                                                                                                                                                                                                                                                                                                                   |
|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50-382.                                                                                                                                                                                                                                                                                                                                           |
| Amendment Date .....                                   | October 20, 2020.                                                                                                                                                                                                                                                                                                                                 |
| ADAMS Accession No .....                               | ML20280A329.                                                                                                                                                                                                                                                                                                                                      |
| Amendment No(s) .....                                  | 258.                                                                                                                                                                                                                                                                                                                                              |
| Brief Description of Amendment(s) .....                | The amendment revised various surveillance requirements (SRs) in Waterford Steam Electric Station, Unit 3 Technical Specification 3.8.1, "A.C. [Alternating Current] Sources—Operating," by correcting the SRs' frequency and voltage values to ensure that the emergency diesel generators are capable of supplying power to the required loads. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                               |

**Exelon Generation Company, LLC; Calvert Cliffs Nuclear Power Plant, Unit 1; Calvert County, MD; Exelon Generation Company, LLC; Calvert Cliffs Nuclear Power Plant, Unit 2; Calvert County, MD**

|                                                        |                                                                                                                                                                                                                                            |
|--------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50-317, 50-318.                                                                                                                                                                                                                            |
| Amendment Date .....                                   | November 6, 2020.                                                                                                                                                                                                                          |
| ADAMS Accession No .....                               | ML20273A088.                                                                                                                                                                                                                               |
| Amendment No(s) .....                                  | 338 (Unit 1) and 316 (Unit 2).                                                                                                                                                                                                             |
| Brief Description of Amendment(s) .....                | These amendments revised certain frequency and voltage acceptance criteria for steady-state emergency diesel generator surveillance testing in Calvert Cliffs Technical Specification 3.8.1, "AC [Alternating Current] Sources—Operating." |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                        |

**Exelon Generation Company, LLC; Dresden Nuclear Power Station, Units 2 and 3; Grundy County, IL**

|                          |                                |
|--------------------------|--------------------------------|
| Docket No(s) .....       | 50-237, 50-249.                |
| Amendment Date .....     | October 23, 2020.              |
| ADAMS Accession No ..... | ML20265A240.                   |
| Amendment No(s) .....    | 272 (Unit 1) and 265 (Unit 2). |

## LICENSE AMENDMENT ISSUANCE(s)—Continued

|                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|--------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Brief Description of Amendment(s) .....                | The amendments revised both the individual and the combined main steam isolation valve (MSIV) leakage rate limit for the four main steam lines in Technical Specification (TS) 3.6.1.3, "Primary Containment Isolation Valves (PCIVs)," Surveillance Requirement (SR) 3.6.1.3.10; added new TS 3.6.2.6, "Drywell Spray"; and revised TS 3.6.4.1, "Secondary Containment," SR 3.6.4.1.1. Implementation of the amendments also included a revision to the Updated Final Safety Analysis Report. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

**Nebraska Public Power District; Cooper Nuclear Station; Nemaha County, NE**

|                                                        |                                                                                                                                                                                                                                                                                                                 |
|--------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50–298.                                                                                                                                                                                                                                                                                                         |
| Amendment Date .....                                   | October 22, 2020.                                                                                                                                                                                                                                                                                               |
| ADAMS Accession No .....                               | ML20282A176.                                                                                                                                                                                                                                                                                                    |
| Amendment No(s) .....                                  | 267.                                                                                                                                                                                                                                                                                                            |
| Brief Description of Amendment(s) .....                | The amendment adopted Technical Specifications Task Force (TSTF) Traveler TSTF–529, Revision 4, "Clarify Use and Application Rules." The amendment modified technical specification (TS) requirements in TS Sections 1.3 and 3.0 regarding limiting condition for operation and surveillance requirement usage. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                             |

**Nine Mile Point Nuclear Station, LLC and Exelon Generation Company, LLC; Nine Mile Point Nuclear Station, Unit 2; Oswego County, NY**

|                                                        |                                                                                                                                                                                                                                                                                                   |
|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50–410.                                                                                                                                                                                                                                                                                           |
| Amendment Date .....                                   | October 20, 2020.                                                                                                                                                                                                                                                                                 |
| ADAMS Accession No .....                               | ML20241A190.                                                                                                                                                                                                                                                                                      |
| Amendment No(s) .....                                  | 182.                                                                                                                                                                                                                                                                                              |
| Brief Description of Amendment(s) .....                | The amendment revised the Nine Mile Point Nuclear Station, Unit 2, alternative source term loss-of-coolant accident radiological analysis, combined the delayed drywell leakage and drywell leakage surveillance requirements, and changed the allowable main steam isolation valve leakage rate. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                               |

**Northern States Power Company—Minnesota; Prairie Island Nuclear Generating Plant, Unit Nos. 1 and 2; Goodhue County, MN**

|                                                        |                                                                                                                                                                                                                                                                                                                        |
|--------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50–282, 50–306.                                                                                                                                                                                                                                                                                                        |
| Amendment Date .....                                   | October 2, 2020.                                                                                                                                                                                                                                                                                                       |
| ADAMS Accession No .....                               | ML20217L185.                                                                                                                                                                                                                                                                                                           |
| Amendment No(s) .....                                  | 232 (Unit 1) and 220 (Unit 2).                                                                                                                                                                                                                                                                                         |
| Brief Description of Amendment(s) .....                | The amendments revised Technical Specification 5.5.14, "Containment Leakage Rate Testing Program," to increase the containment integrated leakage rate test program Type A test interval from 10 to 15 years and extend the containment isolation valve Type C leakage rate test frequency from 60 to up to 75 months. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                    |

**PSEG Nuclear LLC; Hope Creek Generating Station; Salem County, NJ**

|                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 50–354.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Amendment Date .....                                   | November 9, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                               | ML20281A613.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                  | 225.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Brief Description of Amendment(s) .....                | The amendment revised Technical Specification 3.6.2.3, "Suppression Pool Cooling," to modify the action for one inoperable loop to change the allowed outage time from 72 hours to 7 days and to modify the action for both loops inoperable to add an 8-hour allowed outage time in accordance with Technical Specification Task Force (TSTF) Traveler TSTF–230, Revision 1, "Add New Condition B to LCO [Limiting Condition for Operation] 3.6.2.3, 'RHR [Residual Heat Removal] Suppression Pool Cooling.'" |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

**Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Unit 3; Burke County, GA; Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Unit 4; Burke County, GA**

|                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|--------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Docket No(s) .....                                     | 52–025, 52–026.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Amendment Date .....                                   | October 14, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                               | ML20247J442.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                  | 185 (Unit 3) and 183 (Unit 4).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....                | The amendments authorize changes to the Updated Final Safety Analysis Report in the form of departures from the incorporated plant-specific Design Control Document Tier 2 information and involves changes to the plant-specific Technical Specifications (TS). Specifically, the proposed changes would revise the upper limit of the Core Makeup Tank (CMT) boron concentration TS Surveillance Requirement (SR), the mass of trisodium phosphate required by TS Limiting Condition for Operation and associated SR, and the frequency of performance of the CMT boron concentration TS SR. |
| Public Comments Received as to Proposed NSHC (Yes/No). | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

**Tennessee Valley Authority; Watts Bar Nuclear Plant, Unit 2; Rhea County, TN**

|                          |                   |
|--------------------------|-------------------|
| Docket No(s) .....       | 50–391.           |
| Amendment Date .....     | October 21, 2020. |
| ADAMS Accession No ..... | ML20226A444.      |
| Amendment No(s) .....    | 42.               |

## LICENSE AMENDMENT ISSUANCE(s)—Continued

|                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Brief Description of Amendment(s) .....                                                                                          | The amendment increased the authorized reactor core power level by approximately 1.4 percent rated thermal power from 3411 megawatts thermal (MWt) to 3459 MWt, based on the use of the existing Caldon Leading Edge Flow Meter (LEFM) CheckPlus System, and made a conforming change to operating license condition 2.C.(1). The amendment also revised Technical Specification 5.9.5, "Core Operating Limits Report (COLR)," to allow that 100.6 percent rated thermal power may be used only when the feedwater flow measurement is provided by the LEFM as described in the NRC-approved Caldon topical reports for LEFMs. |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                                           | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN</b>                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Docket No(s) .....                                                                                                               | 50–390, 50–391.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Amendment Date .....                                                                                                             | October 28, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                                                                                                         | ML20239A791.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                                                                                            | 137 (Unit 1) and 43 (Unit 2).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Brief Description of Amendment(s) .....                                                                                          | The amendments revised certain Technical Specification Surveillance Requirements (SRs) to add exceptions that consider the SR to be met when automatic valves or dampers are locked, sealed, or otherwise secured in the actuated position, consistent with Technical Specification Task Force Traveler 541, "Add Exceptions to Surveillance Requirements for Valves and Dampers Locked in the Actuated Position."                                                                                                                                                                                                             |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                                           | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO</b>                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Docket No(s) .....                                                                                                               | 50–483.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Amendment Date .....                                                                                                             | November 3, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                                                                                                         | ML20218A410.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                                                                                            | 224.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Brief Description of Amendment(s) .....                                                                                          | The amendment revised the license condition in the Callaway Plant, Unit No. 1 Renewed Facility Operating License associated with its Fire Protection Program, which is authorized under 10 CFR 50.48(c), "National Fire Protection Association (NFPA) Standard 805."                                                                                                                                                                                                                                                                                                                                                           |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                                           | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO</b>                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Docket No(s) .....                                                                                                               | 50–483.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Amendment Date .....                                                                                                             | October 16, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                                                                                                         | ML20246G570.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                                                                                            | 223.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Brief Description of Amendment(s) .....                                                                                          | The amendment revised Technical Specification 5.5.9, "Steam Generator (SG) Program," paragraph d.2 to allow a one-time deferral of the steam generator tube inspections. The proposed changes were submitted in response to social distancing recommendations provided by the Centers for Disease Control and Prevention, which have been issued as a defensive measure against the spread of the Coronavirus Disease 2019.                                                                                                                                                                                                    |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                                           | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Virginia Electric and Power Company, Dominion Nuclear Company; North Anna Power Station, Units 1 and 2; Louisa County, VA</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Docket No(s) .....                                                                                                               | 50–338, 50–339.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Amendment Date .....                                                                                                             | October 29, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                                                                                                         | ML20302A179.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                                                                                            | 286 (Unit 1) and 269 (Unit 2).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....                                                                                          | The amendment added Westinghouse Topical Report WCAP–16996–P–A, "Realistic LOCA Evaluation Methodology Applied to the Full Spectrum of Break Sizes (FULL SPECTRUM LOCA Methodology)," to the list of approved analytical methods used to determine the core operating limits as listed in TS 5.6.5, "Core Operating Limits Report (COLR)."                                                                                                                                                                                                                                                                                     |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                                           | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Virginia Electric and Power Company; Surry Power Station, Unit Nos. 1 and 2; Surry County, VA</b>                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Docket No(s) .....                                                                                                               | 50–280, 50–281.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Amendment Date .....                                                                                                             | October 28, 2020.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| ADAMS Accession No .....                                                                                                         | ML20301A452.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Amendment No(s) .....                                                                                                            | 300 (Unit 1) and 300 (Unit 2).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Brief Description of Amendment(s) .....                                                                                          | The amendments revised TS 6.2.C, "Core Operating Limits Report," to add the Westinghouse Topical Report WCAP–16996–P–A, Revision 1, "Realistic LOCA [Loss of Coolant Accident] Evaluation Methodology Applied to the Full Spectrum of Break Sizes (FSLOCA™ EM)," to the list of methodologies approved for reference in the Core Operating Limits Report (COLR).                                                                                                                                                                                                                                                               |
| Public Comments Received as to Proposed NSHC (Yes/No).                                                                           | No.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

Dated: November 24, 2020.

For the Nuclear Regulatory Commission.

**Gregory F. Suber,**

*Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2020-26309 Filed 11-30-20; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[NRC-2020-0162]

### Information Collection: Voluntary Reporting of Planned New Reactor Applications

**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, "Voluntary Reporting of Planned New Reactor Applications."

**DATES:** Submit comments by February 1, 2021. 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 (unless this document describes a different method for submitting comments on a specific subject); however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov/> and search for Docket ID NRC-2020-0162. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: [Jennifer.Borges@nrc.gov](mailto:Jennifer.Borges@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* David C. 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 C. 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](mailto:Infocollects.Resource@nrc.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Obtaining Information and Submitting Comments

##### A. Obtaining Information

Please refer to Docket ID NRC-2020-0162 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-2020-0162. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC-2020-0162 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 (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML20198M495. The supporting statement is available in ADAMS under Accession No. ML20198M418.

- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

- *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](mailto:INFOCOLLECTS.Resource@NRC.GOV).

##### B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (<https://www.regulations.gov/>). Please include Docket ID NRC-2020-0162 in your comment submission.

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

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:* Voluntary Reporting of Planned New Reactor Applications.
2. *OMB approval number:* 3150-0228.
3. *Type of submission:* Extension.
4. *The form number, if applicable:* N/A.
5. *How often the collection is required or requested:* Annually.
6. *Who will be required or asked to respond:* Applicants, licensees, and potential applicants report this information on a strictly voluntary basis.
7. *The estimated number of annual responses:* 20.
8. *The estimated number of annual respondents:* 20.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 610.

10. *Abstract:* This voluntary information collection assists the NRC in determining resource and budget needs as well as aligning the proper allocation and utilization of resources to support applicant submittals, future construction-related activities, and other anticipated part 50 and/or part 52 of title 10 of the *Code of Federal Regulations* (10 CFR) licensing and design certification rulemaking actions. In addition, information provided to the NRC staff is intended to promote early communications between the NRC and the respective addressees about

potential 10 CFR part 50 and/or part 52 licensing actions and related activities, submission dates, and plans for construction and inspection activities. The overarching goal of this information collection is to assist the NRC staff more effectively and efficiently plan, schedule, and implement activities and reviews in a timely manner.

### 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: November 25, 2020.

For the Nuclear Regulatory Commission.

**David C. Cullison,**

*NRC Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 2020-26449 Filed 11-30-20; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[NRC-2020-0227]

### Operator Licensing Examination Standards for Power Reactors

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Draft NUREG; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft NUREG, NUREG-1021, Revision 12, "Operator Licensing Examination Standards for Power Reactors." NUREG-1021 establishes the policies, procedures, and guidance for the development, administration, and grading of written examinations and operating tests used for examining licensees and applicants for reactor operator and senior reactor operator licenses at power reactor facilities. It also provides procedures and guidance for maintaining operators' licenses and for the NRC to conduct requalification examinations when necessary. The draft NUREG streamlines the examination standards by organizing them in topic-based sections for ease of use, clarifies

existing instructions, and introduces new instructions.

**DATES:** Submit comments by February 16, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC staff 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; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0227. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301-287-9127; email: [Jennifer.Borges@nrc.gov](mailto: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:

Maurin Scheetz, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2758, email: [maurin.scheetz@nrc.gov](mailto:maurin.scheetz@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Obtaining Information and Submitting Comments

###### A. Obtaining Information

Please refer to Docket ID NRC-2020-0227 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-2020-0227.
- *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](mailto:pdr.resource@nrc.gov).

*nrc.gov*. Draft Revision 12 of NUREG-1021 is available in ADAMS under Accession No. ML20329A326. A supporting document that captures changes from Revision 11 to draft Revision 12 is available in ADAMS under Accession No. ML20325A254.

- *Attention:* The PDR, where you may examine and purchase copies of public documents, is currently closed. You may submit your request to the PDR by email to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

###### B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC-2020-0227 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. Discussion

The draft NUREG-1021, Revision 12, provides policies, procedures, and guidance for the development, administration, and grading of examinations used for licensing operators at nuclear power plants under the Commission's regulations in part 55 of title 10 of the *Code of Federal Regulations*, "Operators' Licenses." This draft NUREG also provides guidance for maintaining operators' licenses and for the NRC to conduct requalification examinations when necessary. The NRC is issuing the draft NUREG to (1) streamline information into topic-based sections for ease of use, (2) clarify instructions for the identification and grading of performance deficiencies on the operating test, (3) introduce new instructions for the treatment of critical



tasks and critical and significant performance deficiencies, and (4) implement changes to support the reintegration of the generic fundamentals examination with the site-specific initial licensing examination. To assist in understanding the changes in the draft NUREG, a supporting document that captures changes from Revision 11 to draft Revision 12 is available in ADAMS under Accession No. ML20325A254.

Dated: November 25, 2020.

For the Nuclear Regulatory Commission.

**Christian B. Cowdrey,**

*Chief, Operator Licensing and Human Factors Branch, Division of Reactor Oversight, Office of Nuclear Reactor Regulation.*

[FR Doc. 2020-26460 Filed 11-30-20; 8:45 am]

**BILLING CODE 7590-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** To Be Published.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** Wednesday, December 2, 2020 at 2:00 p.m.

**CHANGES IN THE MEETING:** The Closed Meeting scheduled for Wednesday, December 2, 2020 at 2:00 p.m. has been changed to Wednesday, December 2, 2020 at 10:00 a.m. The following additional matter will also be considered during the Closed Meeting:

- Disclosure of non-public information

**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 from the Office of the Secretary at (202) 551-5400.

Dated: November 25, 2020.

**Eduardo A. Aleman,**

*Deputy Secretary.*

[FR Doc. 2020-26550 Filed 11-27-20; 11:15 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90502; File No. SR-NSCC-2020-003]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving a Proposed Rule Change To Enhance National Securities Clearing Corporation's Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV

November 24, 2020.

On March 16, 2020, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-NSCC-2020-003 ("Proposed Rule Change") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder.<sup>2</sup> The Proposed Rule Change was published for comment in the **Federal Register** on March 31, 2020.<sup>3</sup> The Commission received comment letters on the Proposed Rule Change.<sup>4</sup> On May 15, 2020, pursuant to

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 88474 (March 25, 2020), 85 FR 17910 (March 31, 2020) (SR-NSCC-2020-003) ("Notice"). NSCC also filed the proposal contained in the Proposed Rule Change as advance notice SR-FICC-2020-802 ("Advance Notice") with the Commission pursuant to Section 806(e)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act"). 12 U.S.C. 5465(e)(1); 17 CFR 240.19b-4(n)(1)(i). Notice of filing of the Advance Notice was published for comment in the **Federal Register** on April 15, 2020. Securities Exchange Act Release No. 88615 (April 9, 2020), 85 FR 21037 (April 15, 2020) (SR-NSCC-2020-802). On May 15, 2020, the Commission issued a request for information regarding the Advance Notice. See Commission's Request for Additional Information, available at <https://www.sec.gov/rules/sro/nscs-an/2020/34-88615-request-for-info.pdf>. On September 9, 2020, NSCC submitted its response thereto, which it then amended on October 16, 2020. See Response to Commission's Request for Additional Information, available at <https://www.sec.gov/rules/sro/nscs-an/2020/34-88615-response-to-request-for-info.pdf>; Letters from James Nygard, Director and Assistant General Counsel, NSCC (September 9 and October 16, 2020), available at <https://www.sec.gov/comments/sr-nscs-2020-802/srnscc2020802-7753722-223190.pdf> and <https://www.sec.gov/comments/sr-nscs-2020-802/srnscc2020802-7915013-224474.pdf>. On November 6, 2020, the Commission published a notice of no objection to the Advance Notice. Securities Exchange Act Release No. 90367 (November 6, 2020), 85 FR 73099 (November 16, 2020). The proposal contained in the Proposed Rule Change and the Advance Notice shall not take effect until all regulatory actions required with respect to the proposal are completed.

<sup>4</sup> Comments are available at <https://www.sec.gov/comments/sr-nscs-2020-003/srnscc2020003-7108527-215929.pdf>.

Section 19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.<sup>6</sup> On June 24, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change.<sup>7</sup> On September 22, 2020, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change.<sup>8</sup> For the reasons discussed below, the Commission is approving the proposed rule change.

### I. Description of The Proposed Rule Change

#### A. Background

NSCC provides clearing, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and unit investment trust transactions in the U.S. markets. A key tool that NSCC uses to manage its credit exposure to its Members is collecting an appropriate Required Fund Deposit (*i.e.*, margin) from each Member.<sup>9</sup> A Member's Required Fund Deposit is designed to mitigate potential losses to NSCC associated with liquidation of the Member's portfolio in the event of a Member default.<sup>10</sup> The aggregate of all NSCC Members' Required Fund Deposits (together with certain other deposits required under the Rules) constitutes NSCC's Clearing Fund, which NSCC would access should a Member default and that Member's Required Fund Deposit, upon liquidation, be insufficient to satisfy NSCC's losses.<sup>11</sup>

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> Securities Exchange Act Release No. 88885 (May 15, 2020), 85 FR 31007 (May 21, 2020) (SR-NSCC-2020-003).

<sup>7</sup> Securities Exchange Act Release No. 89145 (June 24, 2020), 85 FR 39244 (June 30, 2020) (SR-NSCC-2020-003).

<sup>8</sup> Securities Exchange Act Release No. 89949 (September 22, 2020), 85 FR 60854 (September 28, 2020) (SR-NSCC-2020-003).

<sup>9</sup> Terms not defined herein are defined in NSCC's Rules and Procedures ("Rules"), available at [http://www.dtcc.com/-/media/Files/Downloads/legal/rules/nscs\\_rules.pdf](http://www.dtcc.com/-/media/Files/Downloads/legal/rules/nscs_rules.pdf). See Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules.

<sup>10</sup> Under NSCC's Rules, a default would generally be referred to as a "cease to act" and could encompass a number of circumstances, such as a member's failure to make a Required Fund Deposit in a timely fashion. See Rule 46 (Restrictions on Access to Services), *supra*, note 9.

<sup>11</sup> See Rule 46 (Restrictions on Access to Services), *supra*, note 9.

Each Member's Required Fund Deposit consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC, as identified within NSCC's Rules.<sup>12</sup> Generally, the largest component of Members' Required Fund Deposits is the volatility component. The volatility component is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99% confidence level. This component represents the amount assumed necessary to absorb losses while liquidating the portfolio.

NSCC's methodology for calculating the volatility component of a Member's Required Fund Deposit depends on the type of security and whether the security has sufficient pricing or trading history for NSCC to robustly estimate the volatility component using statistical techniques. Generally, for most securities (e.g., equity securities), NSCC calculates the volatility component using, among other things, a parametric Value at Risk ("VaR") model, which results in a "VaR Charge."<sup>13</sup> However, the VaR model generally relies on predictability, and this model may be less reliable for measuring market risk of securities that exhibit illiquid characteristics. More specifically, the VaR model relies on assumptions that are based on historical observations of security prices. Securities that exhibit illiquid characteristics, which generally have low trading volumes or are not traded frequently, may not generate sufficient price observations to allow the VaR model to provide a precise estimate of market risk for such securities. Accordingly, for securities that do not have sufficient pricing or trading history to perform statistical analysis, NSCC applies a haircut to calculate the volatility component, in lieu of the VaR-based calculation.

#### *B. Current Practice for Determining Volatility Component for Illiquid Securities and UITs*

Two types of securities for which NSCC uses a haircut to calculate the volatility component are securities that

NSCC deems to be "Illiquid Securities" and UITs. NSCC's Rules currently define an Illiquid Security as a security that is (i) not traded on or subject to the rules of a national securities exchange registered under the Exchange Act, or (ii) an OTC Bulletin Board<sup>14</sup> or OTC Link issue.<sup>15</sup> Based on its interpretation of that definition, NSCC considers securities that are not listed on the national securities exchanges, i.e., those exchanges which are covered by certain third party data/pricing vendors, to be Illiquid Securities.<sup>16</sup> UITs are redeemable securities, or units, issued by investment companies that offer fixed security portfolios for a defined period of time.

Under NSCC's current rules, Illiquid Securities and UITs are subject to haircut-based charges to calculate the volatility component of a Member's Required Fund Deposit based upon two distinct but related rationales. Specifically, Illiquid Securities are considered "securities that are less amenable to statistical analysis, such as OTC Bulletin Board or Pink Sheet issues or issues trading below a designated dollar threshold (e.g., five dollars)," and UITs are considered "securities that are amenable to generally accepted statistical analysis only in a complex manner."<sup>17</sup> Based on these determinations, NSCC considers Illiquid Securities and UITs as categories of

securities that tend to exhibit illiquid characteristics, such as low trading volumes or infrequent trading.<sup>18</sup> NSCC therefore calculates the volatility component for these two categories of securities by multiplying the absolute value of a given position by a percentage that is (1) not less than 10% for securities that are less amenable to statistical analysis, including Illiquid Securities,<sup>19</sup> and (2) not less than 2% for securities that are amenable to generally accepted statistical analysis only in a complex manner, including UITs.

In addition to using the haircut-based volatility charge for Illiquid Securities, NSCC currently can also apply an additional charge (an "Illiquid Charge") for certain positions in Illiquid Securities that exceed volume thresholds set forth in the Rules.<sup>20</sup> NSCC represents that the Illiquid Charge was designed to address a situation where the defaulting Member may have a relatively large position in an Illiquid Security, which would increase the risk that NSCC might face losses when liquidating the Member's position in these securities due to the securities' lack of marketability and other characteristics.<sup>21</sup>

NSCC states that it regularly assesses its market and credit risks, as such risks are related to its margin methodologies, to evaluate whether margin levels are commensurate with the particular risk attributes of each relevant product, portfolio, and market.<sup>22</sup> Based on such assessments, NSCC seeks to refine its current approach to risk managing Member positions in Illiquid Securities and UITs. More specifically, NSCC

<sup>14</sup> The OTC Bulletin Board is an inter-dealer quotation system that is used by subscribing members of the Financial Industry Regulatory Authority ("FINRA") to reflect market making interest in eligible securities (as defined in FINRA's Rules). See <http://www.finra.org/industry/otcbb/otc-bulletin-board-otcbb>.

<sup>15</sup> OTC Link is an electronic inter-dealer quotation system that displays quotes from broker-dealers for many over-the-counter securities. See <https://www.otcmkt.com>.

<sup>16</sup> NSCC represents that it utilizes multiple third-party vendors to price its eligible securities. NSCC believes that national securities exchanges covered by these third party vendors tend to list securities that exhibit liquid characteristics such as having more available public information, larger trading volumes and higher capitalization. See Notice, *supra* note 3, 85 FR at 17912. The exchanges that have established listing services that the vendors cover for this purpose are: New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., The Nasdaq Stock Market and Cboe BZX Exchange, Inc. NSCC represents that Members' Clearing Fund Summary reports, available through the DTCC Risk Portal, identify securities within their portfolio by the ticker symbol and indicate whether those securities are considered Illiquid Securities for purposes of the calculation of the Illiquid Charge. See *id.*

<sup>17</sup> A security that is less amenable to statistical analysis generally lacks pricing or trading history upon which to perform statistical analysis. A security that is amenable to generally accepted statistical analysis only in a complex manner generally may have pricing or trading history, but further calculations upon the pricing or trading history would be required to perform statistical analysis.

<sup>18</sup> Because the VaR model generally relies on predictability, this model may be less reliable for measuring market risk of securities that exhibit illiquid characteristics.

<sup>19</sup> NSCC currently calculates the volatility charge for IPOs, which have fewer than 31 business days of trading history over the past 153 business days, by applying a haircut of 15% and all other Illiquid Securities by applying a haircut of 20%. See Notice, *supra* note 3, 85 FR at 17915.

<sup>20</sup> Specifically, the Illiquid Charge applies to Illiquid Positions as defined under NSCC's Rules. The Rules specify the applicable thresholds that result in an Illiquid Position determination. For example, where a Member's net buy position in an Illiquid Security exceeds a threshold no greater than 100 million shares, that position may become subject to the Illiquid Charge. However, NSCC's rules also provide for certain offsets and credit risk considerations that will be considered when determining whether a position in an Illiquid Security should be considered an Illiquid Position and, thus, subject to the additional Illiquid Charge. See Rule 1 and Sections I.(A)(1)(h) and I.(A)(2)(f) of Procedure XV, *supra* note 9.

<sup>21</sup> See Notice, *supra* note 3, 85 FR at 17912. See also Securities Exchange Act Release No. 80597 (May 4, 2017), 82 FR 21863 (May 10, 2017) (SR-NSCC-2017-001) (order approving proposed rule change to describe the illiquid charge that may be imposed on Members).

<sup>22</sup> See Notice, *supra* note 3, 85 FR at 17912.

<sup>12</sup> See Procedure XV, *supra* note 9.

<sup>13</sup> Specifically, NSCC calculates the VaR Charge as the greatest of (1) the larger of two separate calculations that utilize the VaR model, (2) a gap risk measure calculation based on the largest non-index position in a portfolio that exceeds a concentration threshold, which addresses concentration risk that can be present in a member's portfolio, and (3) a portfolio margin floor calculation based on the market values of the long and short positions in the portfolio, which addresses risks that might not be adequately addressed with the other volatility component calculations. See Sections I.(A)(1)(a)(i) and I.(A)(2)(a)(i) of Procedure XV, *supra* note 9.

proposes to (1) revise the definition of Illiquid Security, (2) adopt specific exclusions from the VaR model, and corresponding haircut-based methods for determining volatility components for positions in Illiquid Securities and UITs, (3) eliminate the existing Illiquid Charge, and (4) make certain conforming changes regarding municipal and corporate bonds and Family-Issued Securities.<sup>23</sup>

### C. Proposed Revision to the Definition of Illiquid Security

Under the Proposed Rule Change, NSCC proposes a new definition of Illiquid Security that would consist of three particular categories of securities. As noted further below, application of the new definition of Illiquid Security would capture a broader set of securities than the current definition.

#### (i) Securities Not Listed on a Specified Securities Exchange

The first category of the new definition of Illiquid Securities would include any security that is not listed on a “specified securities exchange.” For purposes of this definition, NSCC’s Rules would define a “specified securities exchange” as a national securities exchange that has established listing services and is covered by industry pricing and data vendors.<sup>24</sup> NSCC would make the determination of whether a security falls in this category on a daily basis. NSCC represents that this new definition would reflect the process that it currently employs to determine whether a security is not traded on or subject to the rules of a national securities exchange registered under the Securities Exchange Act of 1934, as amended.<sup>25</sup>

#### (ii) Micro-Capitalization Securities and ADRs Subject to an Illiquidity Ratio

The second category of the new definition of Illiquid Securities would apply to certain securities that are listed on a specified securities exchange. Specifically, the types of securities that would potentially be considered as Illiquid Securities under this second category either (i) have a market

capitalization that is considered by NSCC to be a micro-capitalization (“micro-capitalization” or “micro-cap”) as of the last business day of the prior month, or (ii) are American depository receipts (“ADRs”).<sup>26</sup> To determine whether these securities qualify as Illiquid Securities, NSCC would apply, on a monthly basis, an illiquidity ratio test to these two sets of securities.

#### 1. Micro-Capitalization Definition

Initially, NSCC would define “micro-capitalization” as market capitalization of less than \$300 million. Changes to this threshold amount of \$300 million would not be subject to any particular period of review, but would occur when NSCC determines changes may be appropriate.<sup>27</sup> NSCC believes that using market capitalization to consider whether a security is illiquid, in conjunction with the illiquidity ratio test, is appropriate because securities with a market capitalization below a certain threshold tend to exhibit illiquid characteristics such as limited trading volumes and a lack of public information.<sup>28</sup>

#### 2. ADRs

With respect to ADRs, NSCC believes that subjecting these securities to the illiquidity ratio test to determine whether a particular ADR is an Illiquid Security is appropriate because the market capitalization of an ADR may be difficult to calculate. This is because of challenges associated with the day-to-day fluctuation of the conversion rate of an ADR into the relevant local security, which in turn makes it difficult to price the ADR.<sup>29</sup> Without knowing the market capitalization of the ADR, it is therefore difficult to determine whether an ADR represents a non-micro-cap issuer.

<sup>26</sup> ADRs are securities that represent shares of non-U.S. companies that are held by a U.S. depository bank outside of the United States. Each ADR represents one or more shares of foreign stock or a fraction of a share.

<sup>27</sup> Any changes to the micro-cap threshold would be subject to NSCC’s model risk management governance procedures as set forth in the Clearing Agency Model Risk Management Framework (“Model Risk Management Framework”). See Notice, *supra* note 3, 85 FR at 17914. See Securities Exchange Act Release No. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File No. SR-NSCC-2017-008) (describes the adoption of the Model Risk Management Framework of NSCC which sets forth the model risk management practices of NSCC) and Securities Exchange Act Release No. 84458 (October 19, 2018), 83 FR 53925 (October 25, 2018) (File No. SR-NSCC-2018-009) (amends the Model Risk Management Framework). NSCC would notify Members of any changes to the micro-capitalization threshold by Important Notice.

<sup>28</sup> See Notice, *supra* note 3, 85 FR at 17914.

<sup>29</sup> See Notice, *supra* note 3, 85 FR at 17912.

#### 3. Application of the Illiquidity Ratio and the Illiquidity Ratio Test to Micro-Cap Securities and ADRs

The proposal would define the illiquidity ratio for a security as the ratio of the security’s daily price return divided by the average daily trading amount<sup>30</sup> of such security over the prior 20 business days. In addition, if NSCC is unable to retrieve data to calculate the illiquidity ratio for a security on any day, NSCC would use a default value for that day for the security (*i.e.*, the security would be treated as illiquid for that day).

In order to classify a micro-cap security or ADR as “illiquid,” NSCC then takes the illiquidity ratio calculated for these securities and applies an illiquidity ratio test. The test functions as follows: NSCC determines whether the security’s median illiquidity ratio of the prior six months exceeds a threshold that is set to the 99th percentile of the illiquidity ratio of all non-micro-cap common stock using the prior six months of data. Where such a threshold is exceeded, NSCC will designate the relevant security as an Illiquid Security. NSCC performs this exercise, and thereby determines the set of micro-cap securities and ADRs to be considered Illiquid Securities, on a monthly basis.

The illiquidity ratio test is designed to measure the level of a security’s price movement relative to its level of trading activity. For example, given the same dollar amount of trading activity, a larger price movement typically indicates less liquidity. Conversely, for price movement of a given magnitude, a smaller dollar amount of trading activity would indicate less liquidity.

Securities that are exchange-traded products (“ETPs”) with market capitalization of less than \$300 million could be classified as illiquid upon application of the illiquidity test. However, ETPs and ADRs would be excluded when calculating the illiquidity ratio threshold. ETPs are excluded because the underlying common stocks that make up the ETPs are already included in the calculation. ADRs are excluded because it is difficult to determine whether an ADR represents a non-micro-cap issuer. An ADR’s market capitalization may be difficult to calculate due to the fact that, as noted above, each ADR often converts to a different number of shares of a local security. The threshold used in the illiquidity ratio test will be determined

<sup>30</sup> The daily trading amount equals the daily trading volume multiplied by the end-of-day price. See *id.*

<sup>23</sup> The term “Family-Issued Security” means a security that was issued by a Member or an affiliate of that Member. See Rule 1, *supra* note 9.

<sup>24</sup> NSCC has stated that the exchanges that would initially be specified securities exchanges are those listed in note 16. See *supra* note 16.

<sup>25</sup> See Notice, *supra* note 3, 85 FR at 17913. Based on historic performances, NSCC believes the national securities exchanges that the vendors cover are appropriate for determining if a security exhibits characteristics of liquidity because such exchanges tend to list securities that exhibit liquid characteristics such as having more available public information, larger trading volumes, and higher capitalization. See *id.*

by NSCC on a monthly basis using the prior six months of data.

(iii) Securities With Limited Trading History

The third category of the new definition of Illiquid Security would include securities that are listed on a specified securities exchange and, as determined by NSCC on a monthly basis, have fewer than 31 business days of trading history over the past 153 business days on such exchange. NSCC represents that it has historically used such time period to identify initial public offerings (“IPOs”) which tend to exhibit illiquid characteristics due to their limited trading history, thereby making it an appropriate time period to use for the purposes of determining a security’s liquidity, and IPOs would likely constitute most of the securities that would fall into this category.<sup>31</sup>

*D. Proposed Haircut-Based Volatility Charge Specifically Applicable to Illiquid Securities and UITs*

(i) Haircut-Based Volatility Charge Applicable to Illiquid Securities

As proposed in the Notice, NSCC would expressly exclude Illiquid Securities when calculating the volatility component of a Required Fund Deposit using the VaR model and instead would apply a haircut-based volatility charge specifically to Illiquid Securities. To determine the appropriate volatility charge, NSCC would group Illiquid Securities by price level.<sup>32</sup> NSCC generally would calculate one haircut-based volatility charge for short and long positions together. However, with respect to an Illiquid Security that is a sub-penny security, NSCC would calculate the haircut-based volatility charge for short positions and long positions separately.<sup>33</sup>

The haircut percentage applicable to each group of Illiquid Securities would be determined at least annually. The applicable percentage, and the decision of how often the applicable percentage is determined, would be subject to NSCC’s model risk management governance procedures set forth in the Model Risk Management Framework.<sup>34</sup> NSCC states that a number of important considerations consistent with the model risk management practices adopted by NSCC could prompt more frequent haircut review, such as material deterioration of a Member’s backtesting performance, market events, market structure changes, and model validation findings.<sup>35</sup>

The haircut percentage would be the highest of the following percentages: (1) 10%, (2) a percent benchmarked to be sufficient to cover the 99.5th percentile of the historical 3-day returns of each group of Illiquid Securities in each Member’s portfolio, and (3) a percent benchmarked to be sufficient to cover the 99th percentile of the historical 3-day returns of each group of Illiquid Securities in each Member’s portfolio after incorporating a fixed transaction cost equal to one-half of the estimated bid-ask spread.<sup>36</sup> The look-back period for purposes of calibrating the applicable percentage would be no less than five years and would initially be five years to be consistent with the historical data set used in model development. The look-back period may be adjusted by NSCC as necessary consistent with the model risk management practices adopted by NSCC to respond to, for example, market events that impact liquidity in the market and Member backtesting deficiencies.<sup>37</sup>

(ii) Haircut-Based Volatility Charge Applicable to UITs

Similar to its proposed approach to risk managing Illiquid Securities, NSCC would exclude UITs from calculating the volatility component of the Required Fund Deposit using the VaR model, and instead would assign a percentage to be

used in the calculation of a haircut-based volatility charge. UITs are less suited to application of the VaR model because they generally have a limited trading history, which does not provide the type of pricing data that allows for application of the VaR model. NSCC would review the percentage used in this calculation at least annually.

The haircut percentage applicable to UITs would be the highest of (1) 2%, and (2) the 99.5th percentile of the historical 3-day returns for the group of UITs within each Member’s portfolio using a look-back period of no less than 5 years. The applicable percentage, and the decision of how often the applicable percentage is determined, would be subject to NSCC’s model risk management governance procedures set forth in the Model Risk Management Framework.<sup>38</sup>

(iii) Revisions to Description of Securities Not Amenable to Generally Accepted Statistical Analysis or Amenable to Statistical Analysis Only in a Complex Manner

NSCC proposes to revise the existing language in its Rules relating to securities that are either less amenable to statistical analysis or amenable to statistical analysis only in a complex manner.<sup>39</sup> Because Illiquid Securities and UITs would each have specific haircut-based volatility charges pursuant to the Proposed Rule Change, these sections would no longer apply to Illiquid Securities or UITs. Furthermore, NSCC represents that the proposed definition of Illiquid Security would effectively encompass all securities that are currently considered as securities that are less amenable to statistical analysis.<sup>40</sup> However, NSCC believes that it should preserve this category of securities within its Rules because NSCC may find it necessary to calculate margin charges for certain securities that do not constitute Illiquid Securities or UITs and instead would continue to fall under this category.

Further, NSCC represents that certain fixed income securities, such as preferred stocks,<sup>41</sup> would continue to

<sup>31</sup> See Notice, *supra* note 3, 85 FR at 17914.

<sup>32</sup> The price level groupings would be subject to NSCC’s model risk management governance procedures set forth in the Model Risk Management Framework. See Notice, *supra* note 3, 85 FR at 17915; see also Model Risk Management Framework, *supra* note 27.

<sup>33</sup> NSCC states that the different treatment for Illiquid Securities that are sub-penny securities is appropriate because short positions in sub-penny securities have unlimited upside market price risk, as the price of a security may increase and could potentially subject NSCC to losses under its trade guaranty. NSCC further states the proposal would allow NSCC to calculate a haircut-based volatility charge that accounts for this risk of such price movements. Further, NSCC states that sub-penny securities are typically issued by companies with low market capitalization, and may be susceptible to market manipulation, enforcement actions, or private litigation. See Notice, *supra* note 3, at 85 FR at 17915; Letter from Timothy J. Cuddihy, Managing Director, DTCC Financial Risk Management (September 3, 2020) (“NSCC Letter”) at 10.

<sup>34</sup> See Notice, *supra* note 3, 85 FR at 17915; see also Model Risk Management Framework, *supra* note 27.

<sup>35</sup> See *id.*

<sup>36</sup> If NSCC needs to liquidate a defaulting Member’s portfolio, it may incur a transaction cost which represents bid-ask spreads. Bid-ask spreads account for the difference between the observed market price that a buyer is willing to pay for a security and the observed market price for which a seller is willing to sell that security.

<sup>37</sup> Adjustments to the look-back period would be subject to NSCC’s model risk management governance procedures set forth in the Model Risk Management Framework. See Notice, *supra* note 3, 85 FR at 17915; see also Model Risk Management Framework, *supra* note 27.

<sup>38</sup> See *id.*

<sup>39</sup> NSCC represents that it also would remove the phrase “such as OTC Bulletin Board or Pink Sheet issues or issues trading below a designated dollar threshold (e.g., five dollars)” from the existing language relating to securities that are less amenable to statistical analysis. While this language was intended as an example of these types of securities, NSCC now believes that the example inadequately describes all of the securities that are less amenable to statistical analysis and may be misleading. See Notice, *supra* note 3, 85 FR at 17912.

<sup>40</sup> See Notice, *supra* note 3, 85 FR at 17916.

<sup>41</sup> See *id.*

fall into the category of securities that are amenable to statistical analysis only in a complex manner. Thus, these types of securities would still be subject to a haircut-based charge. The application of a haircut percentage to any new security, using these categories, would be subject to NSCC's model risk management governance procedures set forth in the Model Risk Management Framework.<sup>42</sup>

#### *E. Proposed Elimination of the Illiquid Charge*

NSCC proposes to eliminate the existing Illiquid Charge (and the corresponding definition of Illiquid Position), which may be imposed as an additional charge in the volatility component that is applied to Illiquid Securities as securities that are less amenable to statistical analysis. NSCC represents that because the current haircut-based volatility charge that is applied to Illiquid Securities uses fixed percentages for all such securities (15% for IPOs and 20% for the rest of Illiquid Securities), the Illiquid Charge was added to cover some of the risks that the current volatility charge did not cover. NSCC also represents that the proposal would address the risks presented by positions in Illiquid Securities more adequately than the Illiquid Charge, and that therefore the Illiquid Charge would no longer be needed.<sup>43</sup>

#### *F. Proposed Conforming Changes*

NSCC proposes to make two conforming changes to harmonize the Rules in light of the proposed amendments discussed above. First, the current Rules state that securities less amenable to statistical analysis or amenable to statistical analysis only in a complex manner "other than municipal and corporate bonds" shall be excluded from the VaR Charge.<sup>44</sup> NSCC believes that this drafting is unclear regarding whether municipal and corporate bonds are excluded from this section of the Rules. Moreover, the reference to municipal and corporate bonds is not necessary in this portion of the Rules because a different subsection of the Rules<sup>45</sup> provides separately for haircut-based volatility charges for municipal and corporate bonds. The proposal would therefore remove this reference to municipal and corporate bonds from this section of the Rules.

Second, the Rules currently provide that Family-Issued Securities are excluded from calculation of the volatility component using the VaR model because the specific haircut-based volatility charge for such securities is provided in a separate subsection. However, the separate subsection only refers to "long Net Unsettled Positions in Family-Issued Securities."<sup>46</sup> Based on the current drafting of the Rules, NSCC believes that it is unclear how positions in Family-Issued Securities would be treated.<sup>47</sup> In practice, NSCC states that currently, short positions in Family-Issued Securities whose volatility is less amenable to statistical analysis are subject to the haircut set forth in Sections I.(A)(1)(a)(ii) and I.(A)(2)(a)(ii) of Procedure XV, and those short positions in Family-Issued Securities that meet particular volume thresholds are subject to the Illiquid Charge.<sup>48</sup> NSCC proposes to revise the Rules to expressly reference its current practice that long positions in Family-Issued Securities would be excluded from the VaR Charge but subject to the haircut-based volatility charge exclusively applicable to such securities in a separate provision of the Rules. In addition, determination of the appropriate margin for short positions in Family-Issued Securities would continue to be covered by the haircut-based volatility charge in Sections I.(A)(1)(a)(ii) and I.(A)(2)(A)(ii) as securities that are less amenable to statistical analysis.

### **II. Discussion and Commission Findings**

Section 19(b)(2)(C) of the Act<sup>49</sup> directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NSCC. In particular, the Commission finds that the proposed rule change is consistent with Sections

17A(b)(3)(F)<sup>50</sup> and (b)(3)(I)<sup>51</sup> of the Act and Rules 17Ad-22(e)(4)(i), (e)(6)(i), and (e)(23)(ii) thereunder.<sup>52</sup>

#### *A. Consistency With Section 17A(b)(3)(F) of the Act*

Section 17A(b)(3)(F) of the Act<sup>53</sup> requires that the rules of a clearing agency, such as NSCC, be designed to: (i) Promote the prompt and accurate clearance and settlement of securities transactions; (ii) assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible; (iii) foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions; (iv) remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions; and (v) protect investors and the public interest.

The Commission believes that the proposal is consistent with Section 17A(b)(3)(F) of the Act for the reasons stated below.

#### *(i) Prompt and Accurate Clearance and Settlement and Safeguarding of Securities and Funds*

As described above in Section I.C, NSCC proposes to revise the definition of "Illiquid Securities" to provide additional specific objective criteria that would lead to a security being considered as an Illiquid Security, which would, in turn, broaden the scope of securities that would be considered as Illiquid Securities for assessing margin requirements. For example, NSCC would consider additional factors such as an issuer's market capitalization and a defined illiquidity ratio to determine whether a security is illiquid, which would capture certain exchange-listed securities that the current rules do not include as Illiquid Securities. Therefore, the Commission believes that NSCC's proposed new definition of Illiquid Securities is designed to more precisely identify securities with illiquid characteristics than the current methodology.

Moreover, as described above in Section I.D, NSCC proposes to specifically exclude Illiquid Securities and UITs when calculating the volatility component of a Required Fund Deposit using the VaR model, and to change the haircut-based volatility component of

<sup>42</sup> See *id.*; see also Model Risk Management Framework, *supra* note 27.

<sup>43</sup> See Notice, *supra* note 3, 85 FR at 17917.

<sup>44</sup> Sections I.(A)(1)(a)(ii) and I.(A)(2)(a)(ii) of Procedure XV, *supra* note 9.

<sup>45</sup> Section I.(A)(1)(a)(iii) of Procedure XV, *supra* note 9.

<sup>46</sup> *Id.* In addition, the current Rules exclude "family issued security" from the current definition of Illiquid Security, which is subject to Illiquid Charge, providing that the term is provided in Procedure XV, although Procedure XV does not provide such definition.

<sup>47</sup> See Notice, *supra* note 3, 85 FR at 17917.

<sup>48</sup> See Notice, *supra* note 3, 85 FR at 17913 and 17917 n. 52.

<sup>49</sup> 15 U.S.C. 78s(b)(2)(C).

<sup>50</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>51</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>52</sup> 17 CFR 240.17Ad-22(e)(4)(i), (e)(6)(i), and (e)(23)(ii).

<sup>53</sup> 15 U.S.C. 78q-1(b)(3)(F).

the Clearing Fund formula that is applicable to positions in Illiquid Securities and UITs. Currently, in order to calculate the volatility component, fixed percentages are applied to two general categories of securities that encompass Illiquid Securities and UITs, *i.e.*, (1) securities that are less amenable to statistical analysis, and (2) securities that are amenable to generally accepted statistical analysis only in a complex manner. The proposal would apply a specific percentage developed for Illiquid Securities and UITs. In addition, instead of using the current fixed haircut percentages for Illiquid Securities, the proposal would group such securities by price level and apply a different haircut percentage based on the specific price group. Illiquid Securities that are sub-penny securities would be separately grouped by long or short position to more accurately reflect different levels of risk presented by long and short positions of such securities (*i.e.*, a higher level of risk is associated with the short positions in sub-penny securities). The proposal would also require NSCC to regularly assess appropriate haircut percentages to cover its credit risks. The Commission believes that by providing that the volatility component of margin for Illiquid Securities and UITs should be determined by applying haircuts tailored to specific groups of Illiquid Securities and to UITs, this change should result in margin amounts that are more commensurate with the risk attributes of these types of securities, thereby limiting NSCC's credit exposure to Members holding positions in such securities.

NSCC provided information regarding the impact of the proposed rule change on its backtesting coverage.<sup>54</sup> Specifically, a recent impact study shows that the proposal would improve its backtesting coverage from 96.2% to 99.5% for the asset group that exhibited the lowest average backtesting coverage percentages (*i.e.*, short positions in sub-penny securities and securities priced between one cent and one dollar).<sup>55</sup> The

Commission has reviewed NSCC's analysis and agrees that its results indicate that NSCC's proposal results in margin levels that better reflect the risks and particular attributes of the Member's portfolio.

In addition, as described in Section I.E, NSCC proposes to eliminate the existing Illiquid Charge. This existing charge would no longer be needed in light of the revised definition and haircut-based margin methodology described in Sections I.C and I.D, which would more precisely address the risk that the Illiquid Charge purported to cover. As described in Section I.F, NSCC proposes to make conforming changes to harmonize the Rules in light of the changes described in Sections I.C and I.D. The Commission believes that these changes are designed to provide clear and coherent Rules regarding the haircut-based volatility charge for Illiquid Securities and UITs.

Taken together, the Commission believes that the Proposed Rule Change is designed to allow NSCC to collect margin more precisely tailored to the nature of the risks presented by positions in securities with illiquid characteristics than the current methodology, and in a manner that fully addresses NSCC's applicable credit exposures. In turn, the proposal should help ensure that, in the event of a Member default, NSCC's operation of its critical clearance and settlement services would not be disrupted because of insufficient financial resources. Accordingly, the Commission finds that NSCC's proposal should help NSCC to continue providing prompt and accurate clearance and settlement of securities transactions in the event of a Member default, consistent with Section 17A(b)(3)(F) of the Act.

Moreover, by better limiting NSCC's exposure to Members, the proposal is designed to help ensure that NSCC has collected sufficient margin from Members, so that non-defaulting Members would not be exposed to mutualized losses resulting from the default of a Member holding positions in Illiquid Securities and/or UITs. Accordingly, the Commission believes that by helping to limit non-defaulting Members' exposure to mutualized losses, the proposal is designed to help assure the safeguarding of securities and funds which are in NSCC's custody or control, consistent with Section 17A(b)(3)(F) of the Act.

One commenter asserts that the proposal does not promote the prompt and accurate clearance and settlement of

securities transactions, and also does not assure the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible because (1) the haircut-based volatility charge fails to bring clarity and transparency, (2) NSCC failed to explain how the current formula leaves members exposed to default, and (3) NSCC failed to explain how the proposed methodology would limit exposure in the event of a Member default.<sup>56</sup>

The Commission disagrees with this comment. First, and as discussed further in Section II.E, the Commission believes that the Proposed Rule Change identifies what would constitute an Illiquid Security and describes how the haircut-based charge for Illiquid Securities and UITs would apply. Second, and as discussed further above, NSCC provided backtesting results to show that NSCC has a backtest coverage of 96.2% for the asset group that exhibited the lowest average backtesting coverage percentages (*i.e.*, short positions in sub-penny securities and securities priced between one cent and one dollar), as compared to a backtest coverage of 99.5% under the Proposed Rule Change. As demonstrated by the backtesting analysis, under its current margin methodology, NSCC is not achieving its 99% targeted confidence level for asset groups that are Illiquid Securities. Based on its review of the Notice and the materials filed as part of the Proposed Rule Change, in conjunction with the Commission's supervisory observations, the Commission believes that the proposed changes would better enable NSCC to collect margin commensurate with the different levels of risk that Members pose to NSCC as a result of their particular trading activity in Illiquid Securities and UITs. Finally, the Commission believes that the proposed changes would enable NSCC to collect margin that more accurately reflects the risk characteristics of Illiquid Securities and UITs by applying a haircut more precisely tailored to Illiquid Securities (grouped by price level and a long or short positions) and UITs, and therefore allow NSCC to be in a better position to absorb losses in connection with a Member default and manage its credit exposure to such Member.

<sup>54</sup> Backtesting is an ex-post comparison of actual outcomes with expected outcomes derived from the use of margin models. See 17 CFR 240.17Ad-22(a)(1).

<sup>55</sup> See Notice, *supra* note 3, 85 FR at 17915. As part of the Proposed Rule Change, NSCC filed Exhibit 3—NSCC Impact Studies, comparing the current and proposed methodologies. Pursuant to 17 CFR 240.24b-2, NSCC requested confidential treatment of Exhibit 3. NSCC also filed the proposal contained in the Proposed Rule Change as Advance Notice. See *supra* note 3. Because the proposals contained in the Advance Notice and the Proposed Rule Change are the same, all information provided by NSCC regarding the improvements in backtesting coverage for other asset groups was considered regardless of whether the information submitted

with respect to the Advance Notice or the Proposed Rule Change.

<sup>56</sup> See Letter from Daniel Zinn, General Counsel and Cass Sanford, Associate General Counsel, OTC Markets Group Inc. (July 21, 2020) ("OTC II Letter") at 2-3.

## (ii) Protection of Investors and the Public Interest

The Commission believes that the proposal should help protect investors and the public interest by mitigating some of the risks presented by NSCC as a central counterparty. Because a defaulting member could place stresses on NSCC with respect to NSCC's ability to meet its clearance and settlement obligations upon which the broader financial system relies, it is important that NSCC has a robust margin methodology to limit NSCC's credit risk exposure in the event of a Member default. As described above, the Proposed Rule Change would revise the definition of an "Illiquid Security," and the haircut-based methods for determining volatility components for positions in Illiquid Securities and UITs. These changes should help improve NSCC's ability to calculate margin accurately to better produce margin that is more commensurate with the risks associated with its Members' Illiquid Securities and UITs, and thus more effectively cover its credit exposures to its Members. By collecting margin that more accurately reflects the risk characteristics of such securities, NSCC would be in a better position to absorb and contain the spread of any losses that might arise from a Member default. Therefore, the proposal is designed to reduce the possibility that NSCC would need to call for additional resources from non-defaulting Members due to a Member default, which could inhibit the ability of these non-defaulting Members to facilitate securities transactions. Accordingly, the Commission believes that the proposal is designed to protect investors and the public interest by mitigating some of the systemic risks presented by NSCC as a central counterparty.

One commenter states that the proposal does not protect investors because the increased costs will likely be passed on to retail shareholders of small firms.<sup>57</sup> The Commission is not persuaded that the proposal will not protect investors solely because of the potential for increased costs that could be passed on to retail shareholders of small firms. While the proposal may result in an increase in the Required Fund Deposit for a Member who transacts in Illiquid Securities and UITs, such an increase is designed to allow NSCC to reduce the risks it faces associated with Illiquid Securities and UITs in the event of a Member default.<sup>58</sup>

As a result, NSCC should be more resilient so that it can satisfy its obligations as a central counterparty while reducing the possibility that NSCC would need to mutualize among non-defaulting Members any losses arising out of a Member default, which facilitates the protection of investors by helping to ensure that investors receive the proceeds from their securities transactions.

Several commenters expressed concerns that the proposal would discourage entry to the public market by small and growing companies, hinder small business capital formation, negatively impact small company liquidity, and dissuade investors from trading in Illiquid Securities.<sup>59</sup> Several commenters stated that the proposal will hurt small broker-dealers, which in turn will hurt small businesses, and is detrimental to small business capital formation needs.<sup>60</sup> Several commenters stated that the proposal would negate the objectives of Regulations D, A+, and

constrained, may be disproportionately affected by downturns or tightening credit conditions. See Temporary Amendments to Regulation Crowdfunding, Securities Act Release No. 10781 (May 4, 2020), 85 FR 27116, 27123 n. 40 (May 7, 2020) (citing to Gabriel Perez-Quiros and Allan Timmermann, *Firm Size and Cyclical Variations in Stock Returns*, 55(3) *Journal of Finance* 1229–1262 (2000) (showing that "small firms display the highest degree of asymmetry in their risk across recession and expansion states, which translates into a higher sensitivity of their expected stock returns with respect to variables that measure credit market conditions"); Murillo Campello and Long Chen, *Are Financial Constraints Priced? Evidence from Firm Fundamentals and Stock Returns*, 42(6) *Journal of Money, Credit, and Banking* 1185–1198 (2010) (finding that financially constrained firms' business fundamentals are significantly more sensitive to macroeconomic movements than unconstrained firms' fundamentals); Eugene Fama and Kenneth French, *Common Risk Factors in the Returns on Stocks and Bonds*, 3 *Journal of Financial Economics* 3–56 (1993)).

<sup>59</sup> Letter from John Busacca, Founder, The Securities Industry Professional Association (April 23, 2020) ("SIPA Letter") at 3; Letter from James Snow, President, Wilson-Davis & Co., Inc. (November 20, 2020) ("Wilson III Letter") at 5. The SIPA Letter also expresses concern regarding increased costs arising from regulatory and DTC requirements generally, as well as the results of SEC and FINRA trading suspensions. *Id.* at 3. Other commenters expressed similar concern regarding general increases in costs not related to this proposal. See also Letter from Kimberly Unger, The Security Traders Association of New York, Inc. (June 30, 2020) ("STANY Letter") at 2–3; and Letter from James C. Snow, Chief Compliance Officer, Wilson-Davis & Co., Inc. (July 29, 2020) ("Wilson II Letter") at 5. Such issue is not directed to the Proposed Rule Change and, accordingly, is beyond the scope of the Commission's consideration.

<sup>60</sup> See Letter from Charles F. Lek, Lek Securities Corporation (April 30, 2020) ("Lek Letter") at 3; Letter from Daniel Zinn, General Counsel and Cass Sanford, Associate General Counsel, OTC Markets Group Inc. (June 26, 2020) ("OTC I Letter") at 4; STANY Letter at 2.

Crowdfunding, and negatively affect small business capital formation.<sup>61</sup>

In response, NSCC states that the Proposed Rule Change is not designed to advantage or disadvantage capital formation in any particular market segment.<sup>62</sup> NSCC further states that the Proposed Rule Change focuses entirely on managing the clearance and settlement risk associated with secondary transactions in securities with illiquid characteristics as required by Section 17A of the Exchange Act, which is unaffected by those initiatives.<sup>63</sup>

First, with respect to the commenters who raised concerns regarding liquidity and capital formation, the Commission believes that limiting NSCC's exposure to its Members by allowing NSCC to collect more accurate margin to manage its exposure to Illiquid Securities and UITs would benefit Members due to NSCC's decreased exposure to losses resulting from a Member default. Effectively mitigating such risks would, in turn, reduce the likelihood that NSCC would have to call on its Members to contribute additional resources, which would otherwise could be used by its Members to facilitate securities transactions thereby providing liquidity to the securities markets. Thus, the Commission believes that NSCC's proposal, by helping non-defaulting members preserve their financial resources, could promote liquidity provision in such circumstances because these resources would be available to facilitate securities transactions.

The Commission acknowledges that the proposal could increase the margin required to be collected from a Member who transacts in Illiquid Securities and UITs, which, in turn, may cause such a Member to incur additional costs to access needed liquidity for meeting margin requirements. Despite these potential impacts, the Commission is not persuaded that the Proposed Rule Change would have a negative effect on small business capital formation such that it would be inconsistent with the public interest. To the extent that Members incur funding costs associated with additional margin, they may choose to distribute these costs across transactions in all securities for which they make markets rather than allocate those costs only to transactions in securities that require additional margin. Thus, the fact that Members have flexibility in how they allocate

<sup>61</sup> See SIPA Letter at 3; Wilson II Letter at 2; Wilson III Letter at 4; OTC I Letter at 4.

<sup>62</sup> See NSCC Letter at 10.

<sup>63</sup> See *id.*

<sup>57</sup> See OTC II Letter at 3.

<sup>58</sup> This benefit may be particularly important since, as the Commission discussed elsewhere, small firms, which tend to be most financially



costs could mitigate negative impacts, if any, on the liquidity and capital formation of a particular subset of issuers.

The Commission recognizes the possibility that, as a result of the proposed change, some Members may pass along some of the costs related to margin requirements such that they ultimately are borne, to some degree, by investors in Illiquid Securities. However, non-defaulting Members' exposure to mutualized losses resulting from a Member's default and any resulting disruptions to clearance and settlement absent the Proposed Rule Change may also increase costs to investors and potentially adversely impact market participation, liquidity, and access to capital by issuers, including issuers of Illiquid Securities. As a result, and as the Commission previously acknowledged, this proposed rule change may help reduce transaction costs in the markets NSCC clears, and reductions in counterparty default risk allow the corresponding portion of transaction costs to be allocated to more productive uses by market participants who otherwise would bear those costs.<sup>64</sup> Moreover, as discussed in Section II.A(i) above, by helping to limit non-defaulting Members' exposure to mutualized losses, the proposed rule change is designed to help assure the safeguarding of securities and funds of its Members that are in NSCC's custody or control, consistent with Section 17A(b)(3)(F).

Further, the Commission is not persuaded by the commenters' generalized statements on the potential impact on small business capital formation that could result from implementation of the Proposed Rule Change. The Commission acknowledges the possibility that, as the commenter asserted, issuers of securities in smaller companies may experience a reduction in liquidity because of the increased margin requirements applicable to transactions in Illiquid Securities. Nevertheless, the Commission believes that investors would not be discouraged from holding Illiquid Securities. The Commission understands that, in general, stock prices fall in response to a reduction in liquidity until such securities provide an adequate desired return for investors,<sup>65</sup> and some studies indicate illiquid stocks pay investors a higher expected stock excess return to

compensate for greater illiquidity.<sup>66</sup> Thus, as long as stock prices can adjust to reflect the reduced liquidity, affected small issuers may still be able to attract capital from investors, albeit at a higher cost that appropriately reflects the risks inherent in the clearance and settlement of the securities they issue. Moreover, to the extent that investment decisions are driven by other factors, such as the future prospects of specific companies, there might be no decrease in access to capital or little change in cost.

In addition, the commenters' arguments ignore the potential benefits to small businesses when their securities are eligible for central clearing by NSCC. As do other clearing agencies, NSCC provides a number of services that mitigate risk, reduce costs, and enhance processing efficiencies for the securities markets, market participants, issuers (including small issuers), and investors. By reducing NSCC's risk exposure to its members and thus the likelihood of its failure, the proposal helps ensure that NSCC would continue to provide such services, which would benefit securities markets, market participants, issuers (including small issuers), and investors. Thus, the commenters do not take into account any potential positive impacts on small business capital formation that may arise as a result of the Proposed Rule Change.

Therefore, notwithstanding the potential unspecified impact on capital formation in smaller and less liquid markets, as described above, the Commission believes that, in light of the potential benefits to investors arising from the Proposed Rule Change and the resulting overall improved risk management at NSCC, *i.e.*, the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds

based on the collection of margin commensurate with the risks presented by these securities, the Proposed Rule Change is designed to protect investors and the public interest, consistent with Section 17A(b)(3)(F) of the Act.

#### (iii) Fostering Cooperation and Removing Impediments

Several commenters asserted that the Proposed Rule Change is inconsistent with Section 17A(b)(3)(F) of the Act because the proposal neither addresses nor meets all of the elements prescribed in Section 17A(b)(3)(F).<sup>67</sup> In response to these comments, the Commission acknowledges that Section 17A(b)(3)(F) of the Act requires a clearing agency's rules to be designed to meet a number of objectives, as listed above. However, certain proposals may not necessarily directly implicate every aspect of Section 17A(b)(3)(F). Nevertheless, for the reasons discussed below, the Commission disagrees with the commenters that the Proposed Rule Change does not meet with the requirements of Section 17A(b)(3)(F) related to whether a clearing agency's rules are designed to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

One commenter argues that the proposal will not foster cooperation and coordination between the various market participants engaged in processing transactions in Illiquid Securities because increased margin requirements will disadvantage smaller firms, exacerbating the trend of firms ceasing to provide liquidity in thinly traded stocks due to overly burdensome regulatory costs.<sup>68</sup> As an initial matter, Section 17A(b)(3)(F) has a narrower scope than the issue raised by the commenter, in that it addresses cooperation and coordination with persons engaged in the clearance and settlement of securities transactions and not among market participants more broadly. Nevertheless, even when considering Section 17A(b)(3)(F) as it could apply to market participants more broadly, the Commission does not agree with the commenter's argument that increased margin requirements could disadvantage smaller firms and is inconsistent with fostering cooperation and coordination with persons engaged in the clearance and settlement of

<sup>64</sup> See Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786, 70866–67 (October 13, 2016) (S7–03–14) (“CCA Standards Adopting Release”).

<sup>65</sup> See, e.g., Viral Acharya and Lasse H. Pedersen, 2005, *Asset pricing with liquidity risk*, 77 *Journal of Financial Economics* 375–410 (2005).

<sup>66</sup> See, e.g., Yakov Amihud, *Illiquidity and stock returns: Cross-section and time series effects*, 5(1) *Journal of Financial Markets* 31–56 (2002); Joel Hasbrouck, *Trading costs and returns for US equities: Estimating effective costs from daily data*, 64(3) *The Journal of Finance* 1445–1477 (2009); Robert A. Korajczyk and Ronnie Sadka, *Pricing the commonality across alternative measures of liquidity*, 87(1) *Journal of Financial Economics* 45–72 (2008); and Michael J. Brennan, Tarun Chordia, Avanidhar Subrahmanyam and Qing Tong, *Sell-order liquidity and the cross-section of expected stock returns*, 105(3) *Journal of Financial Economics* 523–541 (2012). However, some studies do not find that more illiquid stocks have higher expected returns. See, e.g., Michael J. Brennan and Avanidhar Subrahmanyam, *Market microstructure and asset pricing: On the compensation for illiquidity in stock returns*, 41(3) *Journal of Financial Economics* 441–464 (1996); Matthew I. Spiegel and Xiaotong Wang, *Cross-sectional variation in stock returns: Liquidity and idiosyncratic risk*, Yale ICF Working Paper No. 05–13 (2005).

<sup>67</sup> See OTC I Letter at 4; OTC II Letter at 2–3; Wilson I Letter at 6; Wilson III Letter at 1.

<sup>68</sup> See OTC II Letter at 3.



securities transactions. This proposal would establish a clear and transparent methodology for determining the volatility component of margin for a particular class of securities that would apply to all NSCC Members in a uniform manner.<sup>69</sup> The use of such a uniform methodology is essential to fostering and ensuring cooperation and coordination with persons engaged in the clearance and settlement of securities transactions because it provides a generally applicable and understood methodology established *ex ante* for determining margin for this particular class of securities. The collection of appropriately tailored margin pursuant to this methodology would, in turn, help decrease the likelihood that losses arising out of a Member default would exceed NSCC's prefunded resources and threaten NSCC's ability to continue providing clearance and settlement of securities transactions and to serve market participants as a central counterparty and, therefore, to provide an infrastructure for cooperation in the continued clearance and settlement of securities transactions. Therefore, the Commission believes that the Proposed Rule Change is consistent with fostering cooperation and coordination, as provided under Section 17A(b)(3)(F).

The commenters further state that the proposal would not remove impediments to the national system for prompt and accurate clearance and settlement but would impose additional requirements and increase the already prohibitive transactional costs involved in clearing and settling OTC and small company stocks, making already thinly traded securities more illiquid.<sup>70</sup> The Proposed Rule Change is designed to allow NSCC to better identify securities that present illiquid characteristics based on additional objective criteria and to impose tailored haircuts to determine the appropriate margin for such securities and UITs. These changes will, in turn, enable NSCC to collect margin more precisely tailored to the different levels of risk that Members pose to NSCC as a result of their particular trading activity in Illiquid Securities and UITs, resulting in more accurate clearance and settlement of securities transactions. The Commission believes that these improvements to the clearance and settlement of securities transactions are consistent with removing impediments to the national system for clearance and settlement, in that less precise margin determinations could constitute an impediment to

NSCC's continued ability to clear and settle securities transactions if losses arising out of a Member default were to exceed NSCC's prefunded resources and threaten NSCC's continued operation as a central counterparty for securities transactions. For these reasons, the Commission believes that this change is consistent with removing impediments to the national system of clearance and settlement, as provided under Section 17A(b)(3)(F).

For the reasons discussed above, the Commission believes that the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.<sup>71</sup>

#### *B. Consistency With Section 17A(b)(3)(I) of the Act*

Section 17A(b)(3)(I) of the Act requires that the rules of a clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the Act.<sup>72</sup> This provision does not require the Commission to find that a proposed rule change represents the least anticompetitive means of achieving the goal. Rather, it requires the Commission to balance the competitive considerations against other relevant policy goals of the Act.<sup>73</sup>

The Commission received various comments regarding the proposal's impact on competition. Several commenters argued that the proposal would disproportionately affect smaller broker-dealer Members and small companies.<sup>74</sup> One commenter acknowledged that the proposal would apply to all Members equally, but was concerned that the proposal is likely to disproportionately impact smaller Members and harm competition.<sup>75</sup> Multiple commenters asserted that the proposal would discriminate against small Members because the proposal would demand higher margin, which would in turn raise the cost for liquidity.<sup>76</sup> One commenter further contended that, while large bank-affiliated broker-dealer Members will not have a liquidity issue resulting from the proposal, other Members will have a liquidity issue under the proposal.<sup>77</sup>

<sup>71</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>72</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>73</sup> See *Bradford National Clearing Corp.*, 590 F.2d 1085, 1105 (D.C. Cir. 1978).

<sup>74</sup> See Letter from Christopher R. Doubek, CEO, Alpine Securities Corporation (April 21, 2020) ("Alpine Letter") at 2 and 3; SIPA Letter at 3; and Lek Letter at 2 and 3.

<sup>75</sup> See OTC I Letter at 5.

<sup>76</sup> See Alpine Letter at 2; STANY Letter at 2; OTC I Letter at 5; and Lek Letter at 2.

<sup>77</sup> See Lek Letter at 2. Lek Letter and SIPA Letter also argue that the unfair burden on competition is due to the fact that DTCC's board is almost entirely

In response, NSCC acknowledges that the proposal may result in an increase in the Required Fund Deposit for a Member effecting transactions in Illiquid Securities, and that it may also result in higher margin costs overall for Members whose business is concentrated in Illiquid Securities, relative to other Members with more diversified portfolios. However, NSCC states that the methodology for computing the margin requirement for a Member's Required Fund Deposit under the proposal does not take into consideration the Member's size or overall mix of business in liquid or illiquid securities, including micro-cap securities, relative to other Members. Any effect the proposal would have on a particular Member's margin requirement is solely a function of the default risk posed to NSCC by the Member's activity at NSCC—firm size or business model is not pertinent to the assessment of that risk.<sup>78</sup> Accordingly, NSCC believes that the proposal does not discriminate against Members or affect them differently on either of those bases.

NSCC states that it is required to manage clearance and settlement risk presented by each Member with respect to the particular securities products each Member transacts through the system by, among other things, collecting margin sufficient to cover the risk of default with respect to those trades with a high degree of confidence. Accordingly, each Member is primarily responsible for mitigating the risk associated with its own business.<sup>79</sup> NSCC represents that the proposal is intended to provide a more robust assessment and coverage of the risk associated with volatility exhibited by Illiquid Securities that NSCC has identified through backtesting to the statutorily prescribed level.<sup>80</sup> As contemplated by the Act and Rule 17Ad-22, each Member would be responsible to provide margin commensurate with the default risk

made up of representatives from large banks and other big-businesses. See Lek Letter at 3 and SIPA Letter at 2. This proposal does not change the composition of DTCC's board, and the commenter does not provide specifics information regarding the composition of DTCC's board and how it relates to this proposal. As discussed below, the impact of the proposed changes are determined by a Member's portfolio composition and trading activity rather than a Member's size or type. As addressed throughout, the Commission has concluded that the proposal does not impose any burden on competition not necessary or appropriate in furtherance of the Act.

<sup>78</sup> See NSCC Letter at 4.

<sup>79</sup> See NSCC Letter at 5.

<sup>80</sup> *Id.*

<sup>69</sup> See Section II.E *infra*.

<sup>70</sup> See OTC II Letter at 3; Wilson III Letter at 1.

posed by its business to NSCC under the proposal.

The Commission acknowledges that the Proposed Rule Change could entail increased margin charges to some Members that would be borne by those Members. In considering the costs and benefits of the requirements of Rule 17Ad-22(e)(6), the Commission expressly acknowledged in the CCA Standards Adopting Release that risk-based initial margin requirements may cause market participants to internalize some of the costs borne by the central counterparty as a result of large or risky positions and stated that confirming that margin models are well-specified and correctly calibrated with respect to economic conditions will help ensure that the margin requirements continue to align the incentives of a central counterparty's members with the goal of financial stability.<sup>81</sup> Nevertheless, in response to the comments that the proposal would disproportionately affect smaller broker-dealer Members or those broker-dealer Members that are not affiliated with large banks, the Commission believes that the impact of the proposed changes would be entirely determined by a Member's portfolio composition and trading activity rather than a Member's size or type. The Proposed Rule Change would calculate the volatility component of a Member's Required Fund Deposit based on the risks presented by positions in Illiquid Securities, as described in Section I.C. To the extent a Member's volatility component would increase under the Proposed Rule Change, that increase would be based on the securities held by the Member and NSCC's requirement to collect margin to appropriately address the risk.

In addition, as noted above, the Commission acknowledges that the impact of a higher margin requirement may present higher costs on some Members relative to others due to a number of factors, such as access to liquidity resources, cost of capital, business model, and applicable

regulatory requirements. These higher relative burdens may weaken certain Members' competitive positions relative to other Members.<sup>82</sup> However, the Commission believes that such burden on competition stemming from a higher impact on some members than on others is necessary and appropriate. The Commission believes that NSCC is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. NSCC's members include a large and diverse population of entities. By participating in NSCC, each Member is subject to the same margin requirements, which are designed to satisfy NSCC's regulatory obligation to manage the risk presented by its Members. As discussed in more detail in Section II.D below, this Proposed Rule Change is designed to ensure that NSCC collects margin that is commensurate with the risks presented by Illiquid Securities and UITs.

Furthermore, NSCC has provided an impact study demonstrating that the proposal would raise the current lowest average backtesting coverage from 96.2% to 99.5%.<sup>83</sup> As noted above, the Commission has reviewed NSCC's analysis and agrees that its results indicate that NSCC's proposal results in margin levels that better reflect the risks and particular attributes of the Member's portfolio and help NSCC achieve backtesting coverage that meets its targeted confidence level. In turn, the Commission believes that the Proposed Rule Change would help NSCC better maintain sufficient financial resources to cover its credit exposures to each Member in full with a high degree of confidence. By helping NSCC to better manage its credit exposure, the proposal would help NSCC better mitigate the potential losses to NSCC and its Members associated with liquidating a Member's portfolio in the event of a Member default, in furtherance of NSCC's obligations under Section 17A(b)(3)(F) of the Act as shown in Section II.A.

Therefore, for the reasons stated above, the Commission believes that the Proposed Rule Change is consistent with the requirements of Section

17A(b)(3)(I) of the Act<sup>84</sup> because any competitive burden imposed by the proposal is necessary and appropriate in furtherance of the Act.

#### *C. Consistency With Rule 17Ad-22(e)(4)(i)*

Rule 17Ad-22(e)(4)(i) under the Exchange Act requires that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.<sup>85</sup>

Several commenters question whether NSCC has adequately demonstrated that its proposal is consistent with Rule 17Ad-22(e)(4)(i) under the Exchange Act by showing the insufficiency of NSCC's current margin methodology and whether the increase in margin is necessary.<sup>86</sup> Two commenters state that NSCC has not demonstrated that its current margin requirements are insufficient to cover credit risks to its Members.<sup>87</sup>

In response, NSCC states that the proposal is designed to provide a more accurate measure of the risks associated with Illiquid Securities and to cover in full the risks presented by Members to NSCC.<sup>88</sup> To demonstrate why the proposed revision to its methodology for assessing margin on Illiquid Securities is necessary to address the risk presented by such securities, NSCC relies upon the results of recent backtesting analyses. Specifically, NSCC examines the backtesting coverage for a historical time period under both the current and proposed margin methodologies. Based on this analysis, NSCC represents that the proposal would help NSCC to address the risk presented by Illiquid Securities and that it would improve the lowest average backtesting coverage with respect to Illiquid Securities from 96.2% to 99.5% for the asset group that exhibited the lowest average backtesting coverage percentages (*i.e.*, short positions in sub-penny securities and securities priced between one cent and one dollar).<sup>89</sup>

<sup>81</sup> See CCA Standards Adopting Release, *supra* note 64, 81 FR at 70870. In addition, when considering the benefits, costs, and effects on competition, efficiency, and capital formation, the Commission recognized that a covered clearing agency, such as NSCC, might pass incremental costs associated with compliance on to its members, and that such members may seek to terminate their membership with that CCA. See *id.*, 81 FR at 70865. Moreover, when considering similar comments related to a proposed rule change designed to address a covered clearing agency's liquidity risk, the Commission concluded that the imposition of additional costs did not render the proposal inconsistent with the Exchange Act. See Securities Exchange Act Release No. 82090 (November 15, 2017), 82 FR 55427, 55438 n. 209 (November 21, 2017) (SR-FICC-2017-002).

<sup>82</sup> These potential burdens are not fixed, and affected Members may choose to restructure their liquidity sources, costs of capital, or business model, thereby moderating the potential impact of the Proposed Rule Change.

<sup>83</sup> See note 55.

<sup>84</sup> 15 U.S.C. 78q-1(b)(3)(I).

<sup>85</sup> 17 CFR 240.17Ad-22(e)(4)(i).

<sup>86</sup> See Lek Letter at 1; STANY Letter at 1; OTC I Letter at 2.

<sup>87</sup> See STANY Letter at 1; OTC I Letter at 2.

<sup>88</sup> See NSCC Letter at 6.

<sup>89</sup> *Id.* at 5; 17 CFR 240.17Ad-22(e)(4)(i). NSCC also notes that this improvement in coverage level would allow it to meet the high degree of confidence referenced in Rule 17Ad-22(e)(4)(i). *Id.*

NSCC further states that its backtesting results and Member impact studies indicate that Illiquid Securities, particularly low-priced Illiquid Securities, are more likely to present additional risk.<sup>90</sup>

NSCC notes that the proposed changes to its methodology produce a more accurate haircut calculation by factoring in price levels, resulting in margin levels that better reflect the risks and particular attributes of Member portfolios.<sup>91</sup> NSCC represents that the enhanced methodology for identifying Illiquid Securities and the calculation of the haircut-based volatility component applicable to these securities and UITs improve the risk-based methodology, which in turn, better manage its credit exposures to Members.<sup>92</sup>

The Commission believes that the proposal is consistent with Rule 17Ad-22(e)(4)(i) under the Exchange Act.<sup>93</sup> Specifically, the proposal to revise the definition of Illiquid Securities would help NSCC to better identify securities that may present credit exposures unique to such securities for purposes of applying an appropriate margin charge. The proposal would provide additional criteria that use more objective factors to determine what constitutes an Illiquid Security. These factors consider a security's listing status, trading history, and market capitalization, and would result in a more accurate classification of securities with illiquid characteristics being considered as Illiquid Securities. In addition, the proposal to base the calculation of the haircut-based volatility charge applied to positions in Illiquid Securities and UITs on those securities' price level and risk profile would enable NSCC to collect and maintain sufficient and precisely calibrated resources to cover its credit exposures to each participant whose portfolio contains positions in Illiquid Securities and/or UITs with a high degree of confidence. The Commission has reviewed and analyzed NSCC's analysis of the improvements in its backtesting coverage, and agrees that the analysis demonstrates that the proposal would result in better backtesting coverage and, therefore, less credit exposure to its Members. Finally, the proposal appropriately requires NSCC to

review and determine the haircut percentages at least annually. Accordingly, the Commission believes that the proposal would enable NSCC to better manage its credit risks by allowing it to respond regularly and more effectively to any material deterioration of backtesting performances, market events, market structure changes, or model validation findings.

In response to comments that NSCC has not demonstrated that current margin requirements are insufficient to cover credit risks to its Members, the Commission disagrees. In considering these comments, the Commission thoroughly reviewed and considered (i) the Proposed Rule Change, including the supporting exhibits that provided confidential information on the performance of the proposed revision to the definition of an Illiquid Security and the use of a revised haircut-based methodology applicable to both Illiquid Securities and UITs and backtesting coverage results; (ii) the comments received; and (iii) the Commission's own understanding of the performance of the current margin methodology, with which the Commission has experience from its general supervision of NSCC, compared to the proposed margin methodology.<sup>94</sup> Based on its review of these materials, the Commission believes that the proposal would, in fact, better enable NSCC to cover its credit exposure to Members and meet the applicable Commission regulatory requirements. Specifically, the Commission has considered the results of NSCC's backtesting coverage analyses, which indicate that the current margin methodology results in backtesting coverage that does not meet NSCC's targeted confidence level. The analyses also indicate that the proposal would result in improved backtesting coverage that meets NSCC's targeted coverage level. Therefore, the Commission believes that the proposal would provide NSCC with a more precise margin calculation designed to meet the applicable regulatory requirements for margin coverage.

Therefore, for the reasons discussed above, the Commission believes that the changes proposed in the Proposed Rule Change are reasonably designed to enable NSCC to effectively identify, measure, monitor, and manage its credit

exposure to Members, consistent with Rule 17Ad-22(e)(4)(i).<sup>95</sup>

#### *D. Consistency With Rule 17Ad-22(e)(6)(i)*

Rule 17Ad-22(e)(6)(i) under the Exchange Act requires that each covered clearing agency that provides central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.<sup>96</sup>

Several commenters suggest that the proposal does not reflect the actual risk attributes of the securities to which it would apply.<sup>97</sup> For example, two commenters state that treating as Illiquid Securities all securities that are not listed on a "specified securities exchange," which would be defined as a national securities exchange that has established listing services and is covered by industry pricing and data vendors, is not tailored to accurately capture securities that present the defined liquidation and marketability risks, noting that many large international companies' securities are traded in the OTC marketplace.<sup>98</sup> Two commenters state that the proposal is unwarranted because the existing margin has always been enough to cover a defaulting Member's losses, and accordingly, the current margin should be enough to cover the risks presented by Members' portfolios.<sup>99</sup> One

<sup>95</sup> 17 CFR 240.17Ad-22(e)(4)(i).

<sup>96</sup> 17 CFR 240.17Ad-22(e)(6)(i).

<sup>97</sup> See Alpine Letter; OTC I Letter; STANY Letter; and Letter from Daniel Zinn, General Counsel and Cass Sanford, Associate General Counsel, OTC Markets Group Inc. (July 21, 2020) ("OTC II Letter").

<sup>98</sup> See OTC II Letter at 5; STANY Letter at 3.

<sup>99</sup> See Lek Letter at 1; Wilson III Letter at 3. Lek also states that net capital should be considered solely as additional insurance for agency firms, and that NSCC should include the margin that Lek collects from its customers when computing Lek's capital. *Id.* However, this issue is beyond the scope of this proposal and is not addressed herein.

Further, one commenter argues that the Proposed Rule Change is also unwarranted because NSCC could address NSCC's market risk exposure by modifying the settlement timeline. See Wilson III Letter at 4. According to the commenter, if the NSCC proposed rules that would eliminate the two-day settlement cycle in favor of immediate, same-day electronic settlement, the market risk exposure would be eliminated. See *id.* The Commission disagrees with the argument. The securities industry transitioned to the current two-day settlement cycle on September 5, 2017, only after a multi-year, industry-wide initiative and the Commission's amendment of Rule 15c6-1. See

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As stated above, the volatility component of the margin collected by NSCC is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99% confidence level, and NSCC has established a 99% target backtesting confidence level. See, e.g., Procedure XV, Section LB(3), *supra* note 9.

<sup>90</sup> See NSCC Letter at 5.

<sup>91</sup> See NSCC Letter at 5-6.

<sup>92</sup> See NSCC Letter at 6.

<sup>93</sup> 17 CFR 240.17Ad-22(e)(4)(i).

<sup>94</sup> In addition, because the proposals contained in the Advance Notice and the Proposed Rule Change are the same, all information submitted by NSCC was considered regardless of whether the information submitted with respect to the Advance Notice or the Proposed Rule Change. See *supra* notes 3 and 55.

commenter states that NSCC has not justified a \$300 million market capitalization requirement for all exchange-listed stocks, and that this threshold does not consider the actual risks facing NSCC.<sup>100</sup> Another commenter states that ETPs and ADRs, which are products typically offered by large banks and brokerages, are excluded from the definition of an Illiquid Security, and that such exclusion shows a bias against small Members.<sup>101</sup> In addition, one commenter states that the proposal bears no relationship to a Member's actual credit rating.<sup>102</sup>

In response to comments regarding treating as Illiquid Securities all securities that are not listed on a national securities exchange that has established listing services and is covered by industry pricing and data vendors, NSCC states that securities that trade on a national securities exchange tend to trade with greater frequency in higher volumes than other venues, and national securities exchanges are subject to price and volume reporting regimes that assure greater accuracy of price and volume information.<sup>103</sup> NSCC further states that securities that are not listed on a national securities exchange may trade without being registered with the Commission and have less reliable price and volume information.<sup>104</sup>

In addition, NSCC explains that it included the second element of the criteria, "covered by industry pricing and data vendors," to ensure that NSCC is able to access and utilize quality third party pricing data to derive returns in order to calculate the appropriate margin.<sup>105</sup> NSCC further explains that the commercial availability of reliable information from independent, third party sources is critical to ensuring that NSCC can rely on end of day and intraday pricing in order to accurately manage risk positions consistent with its Rules.<sup>106</sup> Accordingly, NSCC believes that the use of "specified securities exchange" as defined in the proposal is an appropriate basis for

determining whether a security is an Illiquid Security.<sup>107</sup>

Regarding the comments that many large international companies' securities are traded in the OTC marketplace, NSCC acknowledges that the proposed definition of Illiquid Securities would cover the securities of some large, well-capitalized issuers not listed on a specified securities exchange.<sup>108</sup> However, NSCC states that the proposal is designed to appropriately address risk in part by grouping Illiquid Securities by price level, and sub-penny securities by long or short position.<sup>109</sup> Accordingly, not all Illiquid Securities would be given the same haircut or have the same margin requirements or result in a higher deposit than would be required under the current Rules.<sup>110</sup>

The Commission understands that, as described above, the proposal as a whole is designed to enable NSCC to more effectively address the risks presented by Members' positions in securities with illiquid characteristics, including Illiquid Securities and UITs. As such, NSCC seeks to produce margin levels that are more commensurate with the particular risk attributes of these securities, including the risk of increased transaction and market costs to NSCC to liquidate or hedge due to lack of liquidity or marketability of such positions. The Commission believes that the proposal would improve NSCC's ability to consider, and produce margin levels commensurate with, the risks and particular attributes of Illiquid Securities and UITs.

First, by expanding and refining the definition of Illiquid Securities, the Commission believes that NSCC should be able to better identify those securities that may exhibit illiquid characteristics. Specifically, the proposal would ensure that three separate categories of securities are included in the definition of an Illiquid Security, and all three categories are calibrated to take into account specific and objective factors that are indicative of a security's liquidity. For example, the second category of the proposed definition of an Illiquid Security would apply an illiquidity ratio to micro-cap securities and ADRs to get a more precise measure of their liquidity. Moreover, consistent with NSCC's current practice for determining the margin for securities in an initial public offering, the third category of the proposed definition would consider the frequency of a security's trading, to take into account

that infrequent trading reduces the amount of price and volume information available to measure market risk.

In addition, the Commission believes that the proposed changes to the haircut-based volatility charges to base the calculation on the price level and risk profile of the applicable security would help NSCC to more effectively measure the risks that are particular to Illiquid Securities and UITs. Based on its analysis of the backtesting and impact analyses and its understanding of the proposed definition of an Illiquid Security, the Commission believes that the differentiated haircut percentages are reasonably designed to cover NSCC's exposures to Members more precisely and appropriately than the current fixed percentage approach because NSCC designed the variable haircut percentages to reflect specific risks presented by Illiquid Securities by price level and by UITs. The Commission also believes that it is reasonable to separate long and short positions of sub-penny securities in order to reflect the different risk levels presented by such positions.

Taken together, the Commission believes that the proposal should permit NSCC to calculate a haircut-based volatility charge that is more appropriately designed to address the risks presented by the positions in Illiquid Securities and UITs.

In response to the comments questioning whether the proposal is necessary because "the existing margin has always been enough to cover"<sup>111</sup> a defaulting Member's losses, the Commission does not agree that the fact that margin has historically been sufficient to cover a defaulting Member's losses obviates the need for the changes proposed in the Proposed Rule Change. As an initial matter, credit exposures are not measured only by those events that have actually happened, but also include events that could potentially occur in the future. For this reason, a risk-based margin system is required to cover potential future exposure to participants.<sup>112</sup> Potential future exposure is, in turn, defined as the maximum exposure estimated to occur at a future point in time with an established single-tailed

Securities Exchange Act Release No. 78962 (September 28, 2016), 81 FR 69240, 69254 (October 5, 2016) ("Discussion of Current Efforts To Shorten the Settlement Cycle in the U.S."); See Securities Exchange Act Release No. 80295 (March 22, 2017), 82 FR 15564 (March 29, 2017). Therefore, the commenter's suggestion that NSCC could unilaterally shorten the current two-day settlement to a same-day settlement cycle is not a feasible alternative to the Proposed Rule Change.

<sup>100</sup> See STANY Letter at 3.

<sup>101</sup> See SIPA Letter.

<sup>102</sup> See Alpine Letter at 4.

<sup>103</sup> See NSCC Letter at 8.

<sup>104</sup> See NSCC Letter at 8–9.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See Lek Letter at 1; see also Wilson III at 3–4.

<sup>112</sup> 17 CFR 240.17Ad–22(e)(6)(iii) (requiring a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, calculates margin sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default).

confidence level of at least 99% with respect to the estimated distribution of future exposure.<sup>113</sup> Thus, to be consistent with its regulatory requirements, NSCC must consider potential future exposure, which includes, among other things, losses associated with the liquidation of a defaulted member's portfolio. As demonstrated by the backtesting analysis discussed above, under its current margin methodology, NSCC is not achieving its 99% targeted confidence level for asset groups that are Illiquid Securities. Based on its review of the Proposed Rule Change, in conjunction with the Commission's supervisory observations, the Commission believes that the proposed changes would better enable NSCC to collect margin commensurate with the different levels of risk that Members pose to NSCC as a result of their particular trading activity in Illiquid Securities and UITs. Further, the Commission believes the amount of margin NSCC would collect under the proposed changes would help NSCC better manage its credit exposures to its Members and those exposures arising from its payment, clearing, and settlement processes.

In response to the comment asserting that a \$300 million market capitalization requirement for all exchange-listed stocks is not justifiable, the Commission disagrees with this interpretation of the proposal. Not all securities that fall under the market capitalization threshold under the proposal would be deemed to be Illiquid Securities or require a higher margin compared to the current Rules. As set forth in the proposal, the determination of whether a micro-cap security is an Illiquid Security does not rely solely on capitalization. By contrast, under the proposal, the initial determination of whether a security is a micro-cap security would employ a \$300 million threshold,<sup>114</sup> and a micro-cap security would then be subject to the illiquidity ratio test described in Section I.C(ii)3 above to take into account the security's liquidity and determine whether it is an Illiquid Security. Therefore, depending on the liquidity of the issuer, there could be instances where a security with less than \$300 million in market

capitalization would not constitute an Illiquid Security.

In response to the comments stating that treating all securities that are not listed on a specified exchange as Illiquid Securities is not tailored to accurately capture securities that present the defined liquidation and marketability risks, the Commission disagrees. This proposal does not change the current categorization as Illiquid Securities of securities that are not listed on a specified securities exchange, because the current Rules define Illiquid Securities to include securities that are not traded on a national securities exchange. Further, the Commission believes that this distinction is appropriate. Securities that are quoted on the OTC market differ from those listed on national securities exchanges.<sup>115</sup> In particular, the average OTC security issuer is smaller, and their securities trade less, on average, than securities traded on a national securities exchange.<sup>116</sup> Moreover, issuers of quoted OTC securities tend to have a lower market capitalization than those with securities listed on a national securities exchange,<sup>117</sup> and many quoted OTC securities are illiquid.<sup>118</sup> Quoted OTC securities are characterized by significantly lower dollar trading volumes than listed stocks, even for securities of similar size as measured by market capitalization.<sup>119</sup>

In response to the comment that ETPs and ADRs are exempt from the definition of Illiquid Securities, the Commission disagrees. The Proposed Rule Change would not exclude all ETPs and ADRs by category from the definition of Illiquid Securities. Instead, the proposal would only exclude ETPs and ADRs when calculating the illiquidity ratio threshold for purposes of the second test under the definition of an Illiquid Security (*i.e.*, the median of the illiquidity ratio threshold based on non-micro-cap common stocks). An ETP or an ADR could be determined to be an Illiquid Security, and NSCC would apply a haircut to ETPs and ADRs in the same manner as other Illiquid Securities.

Finally, in response to the comment that the proposal bears no relationship to a Member's actual credit rating, the Commission disagrees that such a relationship is necessary in order to design an accurate and appropriate

margin methodology for the securities that a Member holds. Neither the proposal, nor NSCC's margin methodology more broadly, is designed to calculate the volatility component based on a Member's credit rating but rather on the risks presented by each security. Therefore, the Member's credit rating is not relevant to the determination of the appropriate volatility component of the margin for a particular security.<sup>120</sup>

Accordingly, the Commission believes the proposal is consistent with Rule 17Ad-22(e)(6)(i) under the Exchange Act because it is designed to assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of portfolios that exhibit illiquid risk attributes.<sup>121</sup>

#### *E. Consistency With Rule 17Ad-22(e)(23)(ii)*

Rule 17Ad-22(e)(23)(ii) under the Exchange Act requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency.<sup>122</sup>

The majority of commenters express concerns regarding the method for determining the proposed volatility component for Illiquid Securities being confidential. Several commenters express concern that the proposal does not explain how the haircut-based volatility charge will be calculated and that the proposal does not allow Members to review the proposed margin equations, models, and calculations.<sup>123</sup>

<sup>120</sup> The Alpine Letter also questions whether the Credit Risk Rating Matrix ("CRRM") will continue to be used in the margin calculation for Illiquid Securities. See Alpine Letter at 3. NSCC responds that the calculation of the appropriate haircuts for Illiquid Securities, including calculation of the appropriate volume thresholds, does not consider the Member's CRRM rating. The CRRM rating currently is used in determining the Illiquid Position subject to NSCC's Illiquid Charge, which will be eliminated upon implementation of the proposal. See NSCC Letter at 7-8. Going forward, the CRRM would continue to be used in general credit risk monitoring of members, but would not be used for the determination of the volatility component of the margin for a particular security. See Securities Exchange Act Release No. 80734 (May 19, 2017), 82 FR 24177 (May 25, 2017) (order approving proposed rule changes to enhance the CRRM).

<sup>121</sup> 17 CFR 240.17Ad-22(e)(6)(i).

<sup>122</sup> 17 CFR 240.17Ad-22(e)(23)(ii).

<sup>123</sup> See Alpine Letter at 2; SIPA Letter at 4-5; OTC I Letter at 2-3; OTC II Letter at 3-4; Wilson II Letter at 7. Wilson II also asserts that NSCC has failed to meet the requirements of Rule 17Ad-22(e)(23)(iii)

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<sup>113</sup> 17 CFR 240.17Ad-22(a)(13).

<sup>114</sup> NSCC represents that the initial threshold is set at \$300 million because it is based on prevailing thresholds for market capitalization categories in the industry. See NSCC Letter at 9; Notice, *supra* note 3, 85 FR at 17912 n. 24 (citing, as an example of the prevailing views, <https://www.sec.gov/reportspubs/investor-publications/investorpubs/microcapstock.htm>).

<sup>115</sup> Securities Act Release No. 68124 (September 16, 2020), 85 FR 68124, 68185 (October 27, 2020) (S7-14-19) ("Publication or Submission of Quotations Without Specified Information").

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

Other commenters state that the proposal is overly complicated and does not allow Members to predict the financial consequences and operating impacts of their activities, and the impact on their liquidity needs.<sup>124</sup>

In response, NSCC states that the language of the proposal is reasonably transparent and clear enough to enable Members to determine the Member's Required Fund Deposit.<sup>125</sup> NSCC states that the proposed parameters are definitive and non-discretionary to enable application on an algorithmic basis.<sup>126</sup> For example, a security that is an ADR or has a micro-capitalization of less than \$300 million would be subject to the illiquidity ratio test, which would be provided in the Rules, to determine whether it is an Illiquid Security. In addition, NSCC states that, because haircuts would be applied according to the price level of the Illiquid Securities, Members should be able to more easily determine the applied margin impact per the current market price of the security.<sup>127</sup>

NSCC also represents that it maintains the NSCC Risk Management Reporting application on the Participant Browser

for failing to quantify the current inadequate market capitalization, median illiquidity ratios, and how those factors would be improved under the proposal. However, Rule 17Ad-22(e)(23)(iii) requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to publicly disclose relevant basic data on transaction volume and values. This rule does not require a covered clearing agency to disclose the specific information that the commenter seeks because the information described by the commenter is not the basic data on transaction volumes and values required by the rule. Moreover, NSCC publicly provides data on transaction volumes and values in its quantitative disclosures, which are available at <https://www.dtcc.com/legal/policy-and-compliance>.

<sup>124</sup> See Letter from James C. Snow, President/CCO, Wilson-Davis & Co., Inc. (May 1, 2020) ("Wilson I Letter") at 2-3; STANY Letter at 2; Wilson III Letter at 2. Wilson III also states that NSCC failed to meet the requirements of Rule 17Ad-22(e)(23)(ii) and (iii), which requires a clearing agency to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency and to publicly disclose relevant basic data on transaction volume and values, because NSCC has not undertaken the requisite studies or gathered sufficient data to fully understand the impact of the Proposed Rule Change. See Wilson III Letter at 3. The Commission disagrees with this comment. First, as described in more detail below, NSCC provides methods for Members to understand their respective margin requirements. See *infra* note 127 and accompanying text. Second, as stated above, NSCC submitted to the Commission impact studies comparing the impact of the current and proposed methodologies on its Members, and provided additional information regarding the improvements in backtesting coverage for other asset groups in confidential exhibits. See *supra* notes 55 and 94.

<sup>125</sup> See NSCC Letter at 6.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

Service ("PBS") and the NSCC Risk Client Portal ("Portal") to improve transparency of Members' Clearing Fund requirements.<sup>128</sup> NSCC states that the PBS is a member-accessible website portal for accessing reports and other disclosures. NSCC further states that the Risk Management Reporting application enables a Member to view and download Clearing Fund requirement information and component details, including issue-level Clearing Fund information related to start of day volatility charges and mark-to-market, intraday exposure, and other components.<sup>129</sup> NSCC represents that the application enables a Member to view, for example, a portfolio breakdown by asset type, including the amounts attributable to the parametric VaR model and the amounts associated with Illiquid Securities.<sup>130</sup> NSCC also represents that Members are able to view and download spreadsheets that contain market amounts for current clearing positions and the associated volatility charges.<sup>131</sup>

In addition, NSCC represents that the Portal provides members the ability, for information purposes, to view and analyze certain risks relating to their portfolio, including calculators to assess the risk and clearing fund impact of certain activities and to compare their portfolio to historical and average values. For example, it allows Members to review both hourly and 15-minute intra-day snapshots to monitor fluctuations in the volatility and exposure in their portfolios to help Members to anticipate potential intra-day margin calls. The intervals are available through 7:00 p.m. to provide additional reports that may help Members to forecast next-day margin requirements.<sup>132</sup>

NSCC further represents that it maintains the NSCC Client Calculator on the Portal that provides functionality to Members to enter 'what-if' position data and to recalculate their volatility charges to determine margin impact pre-trade.<sup>133</sup> NSCC specifically states that this calculator allows Members to see the impact to the volatility charge if specific transactions are executed, or to anticipate the impact of an increase or decrease to a current clearing position.<sup>134</sup> NSCC represents that the Client Calculator portfolio detail can be downloaded to modify a current margin

portfolio, and then allow Members to upload the portfolio to run a margin calculation, and permit Members to view position level outputs in order to make informed risk management and execution decisions.<sup>135</sup>

Finally, NSCC states that it conducted member outreach in connection with the proposal described in the Proposed Rule Change. NSCC represents that, in 2019 and 2020, NSCC distributed three rounds of impact studies to Members impacted by the change to communicate revisions to the methodology and discuss specific portfolio impacts by reviewing charts and quantitative results.<sup>136</sup> NSCC further represents that it has performed outreach to Members with details for this proposal for the past two years, which allowed Members to understand and ask questions about the proposal.<sup>137</sup>

NSCC states that it has also posted an NSCC Risk Margin Component Guide ("Guide") on the Portal which provides descriptions of some of the components used in NSCC's current risk-based methodology, including the volatility charges, mark-to-market charges, fail charges for CNS transactions, a charge for Family-Issued Securities to mitigate wrong way risk, a charge for Illiquid Positions, a charge to mitigate day over day margin differentials, a coverage component and a backtesting charge.<sup>138</sup> NSCC represents that the Guide will be updated to reflect the changes in methodology set forth in the proposal.<sup>139</sup>

The Commission believes that the proposal is consistent with Rule 17Ad-22(e)(23)(ii) and is designed to provide sufficient information to enable Members to identify and evaluate the risks and other material costs they incur by participating in NSCC. The changes described in the proposal would be

<sup>135</sup> See *id.*

<sup>136</sup> See *id.* Wilson III states that unlike NSCC's representation, only one impact study was received. See Wilson III Letter at 3. The Commission does not believe that NSCC's purported failure to provide particular impact studies to all of its Members is a dispositive factor in determining whether the Proposed Rule Change is designed to be consistent with Rule 17Ad-22(e)(23)(ii). Rule 17Ad-22(e)(23)(ii) requires NSCC to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they may incur. NSCC has (1) acknowledged that that the proposal may result in an increase in the Required Fund Deposit for a Member effecting transactions in Illiquid Securities, and that it may also result in higher margin costs overall for Members whose business is concentrated in Illiquid Securities, relative to other Members with more diversified portfolios, and (2) provided Members with a Portal that enables them to identify and evaluate their costs.

<sup>137</sup> See NSCC Letter at 7.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See NSCC Letter at 7.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

reflected in NSCC's Rules and therefore publicly available to NSCC's Members and prospective members for application to their own portfolios. Specifically, the proposed rule text would reflect the two sets of changes in the proposal. First, the proposed rule text would define the types of securities that would constitute "Illiquid Securities" as three particular categories of securities, as described in Section I.C(i), (ii), and (iii). By reviewing the definitions of an Illiquid Security, NSCC's members should be able to understand the types of factors that would cause a security to be considered an Illiquid Security, all of which are ascertainable, such as its trading history (including whether it is traded on an exchange or not and, if so, on which exchange), its market capitalization, and the type of security (*i.e.*, whether it is an ADR). The specific parameters of the illiquidity ratio test would also be reflected in NSCC's Rules, thereby enabling a Member to determine whether a security that is an ADR or has a micro-capitalization of less than \$300 million would be an Illiquid Security.

Second, the proposed rule text would provide that NSCC would apply a haircut to Illiquid Securities to determine the appropriate volatility component, with Illiquid Securities grouped by price level to determine the appropriate haircut to apply to a particular security. The proposed rule text would further specify that the haircut percentage would be the highest of the three percentages as provided in Section I.D(i), and would be determined at least annually. Additionally, if a Member had questions with respect to a particular security, it could use the various client-facing tools described above to determine whether a security would be considered an Illiquid Security. Taken together, the Commission believes that the proposal, which would be reflected in NSCC's Rules, in conjunction with the various client-facing tools, provides sufficient information to Members to understand the operation of the haircut-based volatility charges and how such charges would apply to particular transactions. The Commission further believes that NSCC provided sufficient information to Members to identify and evaluate the risks and other material costs they would incur due to securities with illiquid characteristics under the proposal.

For these reasons, the Commission disagrees with the comments stating that the proposal lacks details and does not explain how the haircut-based volatility charge will be calculated, and that the proposal does not allow

Members to predict the impact on their activities. The Commission acknowledges that, as some commenters have noted, the proposal does not provide or specify the actual models or calculations that NSCC would use to determine the appropriate haircut or what constitutes an Illiquid Security. However, when adopting the CCA Standards,<sup>140</sup> the Commission declined to adopt a commenter's view that a covered clearing agency should be required to provide, at least quarterly, its methodology for determining initial margin requirements at a level of detail adequate to enable participants to replicate the covered clearing agency's calculations, or, in the alternative, that the covered clearing agency should be required to provide a computational method with the ability to determine the initial margin associated with changes to each respective participant's portfolio or hypothetical portfolio, participant defaults and other relevant information. The Commission stated that "[m]andating disclosure of this frequency and granularity would be inconsistent with the principles-based approach the Commission is taking in Rule 17Ad-22(e)."<sup>141</sup> Consistent with that approach, the Commission does not believe that Rule 17Ad-22(e)(23)(ii) would require NSCC to disclose its actual margin methodology, so long as NSCC has provided sufficient information for its Members to understand the potential costs and risks associated with participating in NSCC for clearing Illiquid Securities.

For the reasons discussed above, the Commission believes that the proposals in the Proposed Rule Change would enable NSCC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide sufficient information to enable Members to identify and evaluate the risks, fees, and other material costs they incur as NSCC's Members, consistent with Rule 17Ad-22(e)(23)(ii).<sup>142</sup>

### III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act<sup>143</sup> and the rules and regulations promulgated thereunder.

<sup>140</sup> 17 CFR 240.17Ad-22(e).

<sup>141</sup> See CCA Standards Adopting Release, *supra* note 64, 81 FR at 70845.

<sup>142</sup> 17 CFR 240.17Ad-22(e)(23)(ii).

<sup>143</sup> 15 U.S.C. 78q-1.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act<sup>144</sup> that proposed rule change SR-NSCC-2020-003, be, and hereby is, *approved*.<sup>145</sup>

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>146</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-26401 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90504; File No. SR-CBOE-2020-111]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

November 24, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 16, 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 its fees 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://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

<sup>144</sup> 15 U.S.C. 78s(b)(2).

<sup>145</sup> In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). See also Section II.B.

<sup>146</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.



## 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 adopt a new COVID-19 Test Fee in connection with the COVID-19 pandemic. By way of background, on March 16, 2020, the Exchange suspended open outcry trading to help prevent the spread of COVID-19<sup>3</sup> and was operating in an all-electronic configuration until June 15, 2020. On June 15, 2020, the Exchange reopened its trading floor, but with a modified configuration of trading crowds in order to implement social distancing and other measures consistent with local and state health and safety guidelines to help protect the safety and welfare of individuals accessing the trading floor. In order to further protect the safety and welfare of individuals accessing the trading floor during the COVID-19 pandemic, the Exchange has determined to implement on-site COVID-19 testing for all trading floor personnel, beginning November 16, 2020. The Exchange has contracted with an independent health care provider who will conduct the tests, which the Exchange anticipates will be conducted twice weekly. The Exchange proposes to adopt a pass-through fee of \$150 per test for each TPH or associated person of a TPH<sup>4</sup> that is tested. The proposed COVID-19 Test Fee allows the Exchange to offset the costs incurred with on-site testing. The Exchange also notes that since the reopening of the

trading floor, the Exchange has, and continues to, incur other COVID-19 related costs that it has not passed through in connection with protecting the health and safety of TPHs and exchange personnel, including costs related to daily-deep cleaning. The Exchange represents that the proposed fee is a pass-through of the costs to the Exchange and that the Exchange will not generate any revenue in excess of those costs.

#### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>5</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>6</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>7</sup> which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes the proposed COVID-19 Test Fee is reasonable as the amount of the proposed fee is the same amount that is assessed to the Exchange by the independent health care provider that will be administering the tests. As noted above, the revenue generated from the proposed fee will not be more than the cost to the Exchange for administering the tests. The Exchange also notes that to date, it has absorbed all the costs incurred in connection with the safety and health protocols it has taken to ensure the safety and welfare of individuals access the trading floor, including daily deep-cleaning of its facilities. The Exchange believes administering COVID-19 tests will help further protect the safety and welfare of individuals accessing its trading floor.

The Exchange believes the proposed fee is equitable and not unfairly discriminatory because such fee will be assessed to any TPH or associated person of a TPH that is tested and accesses the trading floor. The Exchange also notes that implementing on-site COVID-19 testing would benefit all persons accessing the trading floor as it is an additional precautionary measure intended to limit their exposure to COVID-19 and better ensure their safety and welfare.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes the proposed fee is not intended to address any competitive issue, but rather to recoup costs associated with COVID-19 testing in order to help protect the safety and welfare of individuals access the trading floor. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply equally to all similarly situated market participants. The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes only affect trading on the Exchange in limited circumstances.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and paragraph (f) of Rule 19b-4<sup>9</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of

<sup>3</sup> On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic and to slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel, and closed non-essential businesses.

<sup>4</sup> For example, a TPH may have personnel other than Nominees on the floor that need to access the trading floor. Such persons will also be subject to testing requirements and will be assessed the proposed fee.

<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f).



the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2020-111 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2020-111. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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. All submissions should refer to File Number SR-CBOE-2020-111 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-26403 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90510]

### Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") With Respect to Futures Contracts on the SPIKES™ Index

November 24, 2020.

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Exemptive order.

**SUMMARY:** The Minneapolis Grain Exchange, Inc. (or any successor thereto) ("MGEX") has expressed an interest in listing and trading contracts for sale for future delivery on the SPIKES™ Index ("SPIKES") (such futures contracts (and any options thereon) hereinafter referred to as the "Product"). After careful consideration, the Securities and Exchange Commission ("SEC" or "Commission") believes that the Product has the potential to offer competition with the only comparable incumbent volatility product in the market, and is therefore conditionally exempting the Product from the definition of "security future" for all purposes other than as follows: First, the anti-fraud and anti-manipulation provisions under the Exchange Act will continue to apply; second, MGEX will continue to be subject to the requirement to register with the Commission as a national securities exchange (which may be done pursuant to a notice filing) and comply with related amendment and supplemental filing requirements; and third, MGEX will continue to be required, in its capacity as a national securities exchange, to make available to the Commission (or its representatives) books and records relating to transactions in the Product, upon request, and to make itself available to inspection and examination by the Commission (or its representatives), upon request. However, because registration as a notice-registered national securities exchange is intended only as a means to facilitate the Commission's ability to exercise its

books and records and examination authority over the Product, MGEX will be exempt from compliance with all other requirements applicable to national securities exchanges. Taken together, these actions will allow the Product to trade as a futures contract on MGEX, a designated contract market ("DCM") and derivatives clearing organization ("DCO") that is subject to the jurisdiction of the Commodity Futures Trading Commission ("CFTC"), consistent with the terms and conditions set forth below.

**DATES:** This exemptive order is effective as of December 1, 2020.

#### **FOR FURTHER INFORMATION CONTACT:**

Carol McGee, Assistant Director, or Andrew Bernstein, Senior Special Counsel, at (202) 551-5870, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8010.

## I. Introduction

### *A. Overview of the SPIKES Index*

On October 12, 2018, the Commission issued an order granting approval of a proposed rule change to allow the Miami International Securities Exchange LLC ("MIAX") to list and trade options on SPIKES.<sup>1</sup> Although that order permits MIAX to treat SPIKES as a broad-based index, as defined under MIAX's rules, solely for purposes of determining the position limits, exercise limits, and margin requirements that apply to each options trade, the Commission stated explicitly that it was not determining whether SPIKES is a "narrow-based security index," as defined in Section 3(a)(55)(B) of the Exchange Act.<sup>2</sup>

SPIKES measures the expected 30-day volatility of the SPDR® S&P 500® ETF Trust ("SPY"), and is calculated using a variance swap methodology that includes live prices of existing exchange-traded options on the SPY to calculate volatility. Specifically, the SPIKES formula relies on the prices of standard monthly SPY options that expire on the third Friday of each calendar month.<sup>3</sup> The formula uses

<sup>1</sup> See Order Granting Approval of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES™ Index, Exchange Act Release No. 84417 (Oct. 12, 2018), 83 FR 52865 (Oct. 18, 2018) (SR-MIAX-2018-14) ("SPIKES Options Approval Order").

<sup>2</sup> See SPIKES Options Approval Order, 82 FR at 52867 n. 36.

<sup>3</sup> See The SPIKES Volatility Index: Methodology Guide (available at: [https://www.miaxoptions.com/sites/default/files/spikes-files/SPIKES\\_Methodology\\_Guide.pdf](https://www.miaxoptions.com/sites/default/files/spikes-files/SPIKES_Methodology_Guide.pdf)) ("SPIKES Methodology").

those prices to linearly interpolate between the variances of two monthly SPY option expirations—near-term (the closest expiration more than two full days into the future) and next-term (the monthly expiration following the near-term). This expiration selection method is intended to avoid using highly irregular SPY option prices close to the options settlement date.<sup>4</sup> When the near-term expiration is too close to expiry (less than two full days), rolling to the third-closest expiration occurs.<sup>5</sup>

The number of options included in the SPIKES calculation varies, and depends on the prices of live out-of-the-money (“OTM”) SPY options.<sup>6</sup> In order to determine which SPY options are OTM, the methodology requires identification of the at-the-money (“ATM”) SPY options for both the near-term and next-term options by calculating the absolute value of the call cash reference price minus the put cash reference price for all SPY options for which both call and put prices are available, and then selecting the strike price where that value is closest to zero (or in the case of a tie, using the lower strike).<sup>7</sup> Once the ATM price has been identified, each OTM SPY option successively further away from the money is included in the calculation (for both the near-term and next-term) until two consecutive options with a cash reference price of five cents or less is reached, at which point all remaining far OTM options are excluded.<sup>8</sup> The included OTM options are then weighted and used in the SPIKES formula to calculate the annualized

expected volatility of the SPY, which is quoted in percentage points.<sup>9</sup>

The Commission understands that SPY options are used as inputs to the SPIKES formula, which is designed to interpolate the expected volatility of a single ATM option that expires in precisely 30 days. That formula requires the use of multiple live SPY options to determine the price (and ultimately the volatility) of what is essentially a synthetic SPY option that is both ATM and expires in exactly 30 days, updated on a real-time basis on each trading day beginning at 9:30 a.m. and ending at 4:15 p.m. (New York time).<sup>10</sup>

#### B. Statutory Authority

The Commodity Futures Modernization Act of 2000 (“CFMA”)<sup>11</sup> authorized the trading of security futures, which are defined in Section 3(a)(55)(A) of the Exchange Act<sup>12</sup> and Section 1a(44) of the Commodity Exchange Act (“CEA”)<sup>13</sup> to include a contract of sale for future delivery of a single security or of a narrow-based security index,<sup>14</sup> including any interest therein or based on the value thereof, other than certain exempt securities. A security future is considered to be a “security” for purposes of the Federal securities laws, including the Exchange Act<sup>15</sup> and the Securities Act of 1933 (“Securities Act”),<sup>16</sup> and a futures contract for purposes of the CEA.<sup>17</sup> Thus, the regulatory framework established by the CFMA provides the Commission and the CFTC with joint jurisdiction over security futures products.<sup>18</sup>

A futures contract on the SPIKES is a futures contract that is based on the value of a single security (*i.e.*, the SPY)<sup>19</sup> and therefore satisfies the

statutory definition of security future in Section 3(a)(55) of the Exchange Act. Nevertheless, the Commission has determined to use its authority in Section 36 of the Exchange Act to exempt a futures contracts on the SPIKES from the definition of “security future” under the Exchange Act, subject to the exceptions and conditions set forth below.<sup>20</sup>

#### C. Exemptive Relief Under Section 36

Section 36(a)(1) of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.<sup>21</sup> After careful consideration, the Commission finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exercise its authority to exempt the Product from the definition of security future in Section 3(a)(55) of the Exchange Act for all purposes under the Exchange Act, other than certain specified provisions, including: (1) The anti-fraud and anti-manipulation provisions under the Exchange Act, (2) the obligation of MGEX to register with the Commission as a national securities exchange; (3) the obligation of MGEX to make available to the Commission (or its representatives) books and records relating to transactions in the Product, upon request; and (4) the obligation of MGEX to make itself available to inspection and examination by the Commission (or its representatives), upon request.

As a result of this exemptive order, market participants will be able to transact in the Product as a futures contract on MGEX, a DCM and DCO that is subject to the jurisdiction of the CFTC, consistent with the terms and conditions set forth below. The Commission believes that permitting the Product to trade as a futures contract, as opposed to as a security future, should foster competition as it could serve as

Weekly SPY options are not used in the SPIKES calculation.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> In-the-money SPY options are not included in the SPIKES calculation. See *id.*

<sup>7</sup> See *id.* The “cash reference price” is the price of a particular SPY option, as determined using the “price dragging” technique set forth in the SPIKES methodology. MIAX describes “price dragging” as the proprietary method used for determining the ongoing price for each individual option used in the calculation of SPIKES. Pursuant to that process, all prices are initially set to zero. If there is a trade, the price of the option is always set to the trade price. If there is not yet a trade, on the opening quote, the opening bid is used as the current price. For newly-placed ask (bid) quotes, if the ask (bid) is lower (higher) than the current ongoing reference price, the option price is set to ask (bid). MIAX believes that this process “should materially reduce erratic movements of the [SPIKES] value as quotations on [OTM] options are rapidly altered during times of low liquidity.” See Notice of Filing of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES™ Index, Exchange Act Release No. 83619 (July 11, 2018), 83 FR 32932, 32934 (“SPIKES Options Notice”).

<sup>8</sup> See SPIKES Methodology, *supra* note 3.

<sup>9</sup> See SPIKES Options Notice, 83 FR at 32933.

<sup>10</sup> See SPIKES Options Approval Order, 83 FR at 52865–66.

<sup>11</sup> Public Law 106–554, 114 Stat. 2763 (2000).

<sup>12</sup> 15 U.S.C. 78c(a)(55)(A).

<sup>13</sup> 7 U.S.C. 1a(44).

<sup>14</sup> The term “narrow-based security index” is defined in Section 1a(35)(A) of the CEA and Section 3(a)(55)(B) of the Exchange Act. 7 U.S.C. 1a(35)(A) and 15 U.S.C. 78c(a)(55)(B).

<sup>15</sup> See Section 3(a)(10) of the Exchange Act. 15 U.S.C. 78c(a)(10).

<sup>16</sup> See Section 2(a)(1) of the Securities Act. 15 U.S.C. 77b(a)(1).

<sup>17</sup> See Section 1a(44) of the CEA. 7 U.S.C. 1a(44).

<sup>18</sup> Section 3(a)(56) of the Exchange Act and Section 1a(45) of the CEA define “security futures product” to mean a security future or any put, call, straddle, option, or privilege on any security future. 15 U.S.C. 78c(a)(56) and 7 U.S.C. 1a(45).

<sup>19</sup> As previously discussed, the SPIKES calculation uses live OTM SPY options to interpolate the price of a single synthetic precisely 30-day ATM SPY option which, in turn, is used to calculate the precisely 30-day volatility of the SPY. Thus, a futures contract on SPIKES could, in the alternative, be viewed as a future based on the value of such single synthetic 30-day ATM SPY option.

<sup>20</sup> In the alternative, if SPIKES were considered to be an index composed of options on the SPY, a futures contract based on SPIKES would be a security future because SPIKES is a narrow-based security index under the definition set forth in Section 3(a)(55)(B) of the Exchange Act. See, e.g., Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities, Exchange Act Release No. 54106 (July 6, 2006), 71 FR 39534, 39536–37 (July 13, 2006).

<sup>21</sup> 15 U.S.C. 78mm(a)(1).

an alternative to the only comparable incumbent volatility product in the market. Facilitating greater competition among these types of products should provide market participants with access to a wider range of financial instruments to trade on and hedge against volatility in the markets, particularly the S&P 500. In addition, the introduction of an additional volatility product in the market should lower transaction costs for market participants. Further, because SPY options are traded on 16 different national securities exchanges, the Commission would expect there to be a large number of market participants able to act as market makers in the Product. Moreover, the fact that SPY options are multi-listed should provide resiliency by reducing the likelihood that a disruption on one or more options exchanges could lead to a disruption in trading in the Product.

The Commission understands, however, that the Product will need to trade, clear, and settle as a futures contract on a CFTC-regulated DCM and DCO in order to achieve such benefits to the market. This order, and the exemption of the Product from the definition of “security future,” subject to the terms and conditions discussed below, is intended to achieve that result.

## II. Exemptive Relief

### A. Scope

Pursuant to Section 36 of the Exchange Act, the Commission is exempting the Product from the definition of “security future” in Section 3(a)(55) of the Exchange Act for all purposes under the Exchange Act other than as follows. First, such definitional exemption does not apply to the anti-fraud and anti-manipulation provisions of the Exchange Act (including related investigative, enforcement, and procedural authority) in Sections 9, 10, 15(c), 20, 20A, 21, 21A, 21B, 21C, 21D, 26, and 27,<sup>22</sup> and the rules and regulations thereunder. Moreover, and as discussed in detail below, trading in the Product will remain subject to the anti-fraud provisions of Section 17(a) of the Securities Act.<sup>23</sup>

Given that the price of a futures contract on the SPIKES is based on the value of the SPY and is derived using SPY options as inputs to a formula that creates a synthetic SPY option, the Commission believes it must retain the ability to exercise enforcement authority

when necessary to protect the integrity of the securities markets to the extent that fraudulent or manipulative trading activity occurs in connection with transactions in the Product that could impact trading in the underlying securities (*i.e.*, SPY or SPY options), or vice versa. Accordingly, the Commission is retaining this authority to, among other things, help prevent the possibility of market participants using fraudulent or manipulative transactions in the Product as a surrogate for transactions in the underlying securities in order to evade the Commission’s anti-fraud and anti-manipulation authority. Similarly, the Commission also would expect to use its anti-fraud and anti-manipulation authority in the event that a market participant were to use transactions in the securities markets to engage in fraudulent or manipulative activities related to the Product.

Second, the exemption from the definition of security future does not apply to the requirement to register with the Commission as a national securities exchange, as set forth in Section 5 of the Exchange Act, and the rules and regulations thereunder, and the requirements applicable to national securities exchanges, as set forth in Section 6 of the Exchange Act, and the rules and regulations thereunder, including Section 6(g), which applies to an exchange that lists and trades only security futures products. Specifically, Section 6(g) of the Exchange Act provides that an exchange that lists or trades security futures products may register as a national securities exchange solely for the purposes of trading security futures products if: (1) The exchange is a board of trade, as that term is defined by Section 1a(6) of the CEA,<sup>24</sup> that has been designated a contract market by the CFTC and such designation is not suspended by order of the CFTC; and (2) such exchange does not serve as a market place for transactions in securities other than security futures products or futures on exempted securities or groups or indexes of securities or options thereon that have been authorized under Section 2(a)(1)(C) of the CEA.<sup>25</sup> Because MGEX satisfies the two conditions set forth in Section 6(g), it could avail itself of that provision to notice register as a national securities exchange by completing and submitting Form 1-N pursuant to

Exchange Act Rule 6a-4(a)(1).<sup>26</sup> By notice registering as a national securities exchange under Section 6(g), MGEX would also be subject to the ongoing requirements under Exchange Act Rule 6a-4 regarding amendments to MGEX’s notice of registration on Form 1-N,<sup>27</sup> as well as periodic filings regarding certain supplemental material related to the trading of security futures products on MGEX.<sup>28</sup>

The Commission believes that registration as a national securities exchange is necessary in order to facilitate the use of the Commission’s anti-fraud and anti-manipulation authority with respect to the Product. Registration will allow the Commission to access the information it needs to determine whether fraudulent or manipulative activity has occurred, the scope of such activity, and the parties engaging in it. Accordingly, MGEX will remain subject to the provisions in Section 17(a) of the Exchange Act, and the rules and regulations thereunder. Thus, the exemption from the definition of security future does not apply to the obligation of MGEX, in its capacity as a national securities exchange, to make and keep records relating to transactions in the Product, furnish such copies thereof, and to make and disseminate such reports available to the Commission (or its representatives), upon request.<sup>29</sup> In particular, Exchange Act Rule 17a-1 requires each national securities exchange to: (1) Keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity; (2) keep all such documents for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of Exchange Act Rule 17a-6;<sup>30</sup> and (3) upon request of

<sup>26</sup> See 17 CFR 240.6a-4(a)(1). Rule 6a-4(a)(2) also requires that promptly after the discovery that any information filed on Form 1-N was inaccurate when filed, the exchange shall file with the Commission an amendment correcting such inaccuracy. See 17 CFR 240.6a-4(a)(2).

<sup>27</sup> See 17 CFR 240.6a-4(b).

<sup>28</sup> See 17 CFR 240.6a-4(c).

<sup>29</sup> 15 U.S.C. 78q(a).

<sup>30</sup> Exchange Act Rule 17a-6 applies to national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board, and allows for the destruction or disposal of records by these entities prior to the five-year retention period of Exchange Act Rule 17a-1 if done according to a plan for destruction or disposal that is filed with and approved by the Commission. 17 CFR 240.17a-6.

<sup>22</sup> 15 U.S.C. 78(i), (j), o(c), t, t-1, u, u-1, u-2, u-3, u-4, z, and aa.

<sup>23</sup> 15 U.S.C. 77q(a). See *infra* note 53 and accompanying text (discussing the application of Section 17(a) of the Securities Act to the Product).

<sup>24</sup> The cross-reference in Section 6(g) of the Exchange Act to the definition of “board of trade” cites to Section 1a(2) of the CEA which is no longer accurate due to subsequent amendments made to Section 1a of the CEA that modified the paragraph numbering.

<sup>25</sup> 15 U.S.C. 78f(g).

any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (a) and (b) of the rule.<sup>31</sup>

Similarly, MGEX will remain subject to Section 17(b) of the Exchange Act, and the rules and regulations thereunder.<sup>32</sup> Thus, the exemption from the definition of security future does not apply to the obligation of MGEX, in its capacity as a national securities exchange, to make itself available to inspection and examination by the Commission (or its representatives), upon request.

Taken together, these provisions are intended to provide the Commission with prompt access to the information it needs to help determine whether fraudulent or manipulative activity has occurred and whether additional steps are necessary to halt such activity. Such information also should help to inform the Commission during the course of taking necessary enforcement action against parties in connection with transactions in the Product. For example, MGEX's records of transactions in the Product should provide Commission staff with a key resource for analyzing whether manipulation has occurred (in the Product, the SPY, or SPY options). Trading records also should help the Commission and its staff analyze the amount of damages (including potential disgorgement) in connection with such enforcement matters.

However, the Commission also recognizes that Section 6 of the Exchange Act imposes other requirements on national securities exchanges that have no relation to recordkeeping or examination requirements, and are therefore unlikely to assist the Commission in utilizing its anti-fraud and anti-manipulation authority over the Product. Accordingly, the Commission is providing MGEX with an exemption from all of the Section 6 requirements applicable to national securities exchanges, other than the ones described above. For example, under this exemptive relief, MGEX will not be required to comply with: (1) The requirement in Section 6(h)(2) of the Exchange Act to only trade security futures that conform with listing standards that are filed with the Commission under Section 19(b) of the Exchange Act and meet the criteria specified in Section 2(a)(1)(D)(i) of the CEA; (2) the requirements for listing standards and conditions for trading set

forth in Section 6(h)(3) of the Exchange Act (including with respect to margin); and (3) the requirement to submit proposed rule changes to the Commission, including those that would otherwise be required by Section 6(g)(4)(B) of the Exchange Act. With respect to the listing standard requirements, given that this order allows MGEX to trade the Product as a future (and not as a security future), we do not believe it necessary or appropriate to require MGEX to comply with listing standard requirements that are specific to security futures. Rather, MGEX will be able to trade the Product under the listing standards for futures contracts that are subject to the CFTC's oversight.<sup>33</sup>

Finally, the exemption from the definition of security future does not apply to the requirement to register with the Commission as a clearing agency, as set forth in Section 17A of the Exchange Act, and the rules and regulations thereunder, including the exemption from registration in paragraph (b)(7) of that section. Specifically, and as discussed in detail in Section II.C below, by not including Section 17A in the exemptive relief provided for in this order, MGEX will be able to avail itself of the statutory exemption from clearing agency registration in Section 17A(b)(7), which applies to certain clearing agencies that do not clear securities other than security futures.<sup>34</sup> This carve-out from the exemptive relief is not intended to affect MGEX's obligations under this order, but rather to clarify its ability to rely on an exemption from Section 5 of the Securities Act, as discussed in detail in Section II.C.

In crafting the scope of this exemptive order, the Commission recognizes that the CFTC has a regulatory regime that will govern every aspect of the Product on a day-to-basis, including the DCM and DCO on which it trades and clears (*i.e.*, MGEX), and the market participants that are members of that DCM and DCO. The Commission intends to exercise its authority over MGEX and the Product for the limited purposes of enforcing its anti-fraud and anti-manipulation authority in connection with trading in the Product, which it is retaining pursuant to this

order. Such retained authority is in addition to the CFTC's jurisdiction over the Product and MGEX, which includes enforcing anti-fraud provisions and registration and recordkeeping obligations under the commodity laws. Accordingly, the Commission does not believe that additional requirements beyond those specified in this order are necessary given that such requirements would generally not directly impact the Commission's ability to determine whether and how to use its anti-fraud and anti-manipulation authority in connection with trading in the Product.

### B. Conditions

The relief the Commission is providing in this order is predicated upon certain facts and circumstances regarding how the Product (and the securities that underlie it) are currently structured and traded. That information has allowed the Commission to reach certain conclusions that relate to, among other things, the susceptibility of the Product (or its underlying securities) to manipulation and the ability of the SPY to effectively track the S&P 500. To the extent that those facts and circumstances were to change, such modifications could potentially undermine the basis for providing relief. Accordingly, this exemptive order includes a number of conditions. Those conditions, which are described in detail below, generally fit into one of two categories, as follows: (1) Conditions related to the SPIKES calculation, including the liquidity and trading venue of the required inputs; and (2) conditions on the relationship between the SPY and the S&P 500 Index.

To the extent that one or more of these conditions is no longer satisfied, this exemptive order will no longer apply three calendar months after the end of the month in which any condition is no longer satisfied. The Commission recognizes that, to the extent that the exemptions in this order are no longer effective, market participants will need time to take the necessary steps to wind down their existing transactions in an orderly fashion, which typically requires entering into offsetting transactions. In that respect, we believe that three calendar months is a sufficient amount of time to allow for such activity to occur.<sup>35</sup>

<sup>35</sup> As an example of an analogous situation, the statutory definition of narrow-based security index in Section 3(a)(55) of the Exchange Act (which is used to determine whether a future on a security index is a security future) includes a similar three month grace period after an index transitions from broad- to narrow-based. See 15 U.S.C. 78c(a)(55)(E).

<sup>31</sup> 17 CFR 240.17a-1.

<sup>32</sup> 15 U.S.C. 78q(b).

<sup>33</sup> The exemption from the requirements in Section 6 of the Exchange Act applies to MGEX so long as it is only lists and trades the Product (as well as futures contracts subject to the CFTC's exclusive jurisdiction). To the extent that MGEX were to expand its offerings to include a security futures product that is not subject to this exemptive order, all of the requirements in Section 6 would apply to such security futures product. In such an instance, however, the applicable exemption would continue to apply to the Product.

<sup>34</sup> See *infra* note 54.

Finally, the Commission notes that some of these conditions contain numerical thresholds, the purposes of which are explained below in the discussion of each relevant condition. As a general matter, each threshold is intended to help ensure either that the securities used to calculate the SPIKES are not readily susceptible to manipulation because of their significant liquidity,<sup>36</sup> or that the Product continues to serve as a competitor to other financial products that measure the volatility of the S&P 500 Index because the SPY continues to closely track the index. The level of each threshold is based on historical public data relevant to the objective of the particular condition. In each instance, the thresholds seek to balance the importance of achieving the stated purpose of the relevant condition with the fact that the consequence of breaching these thresholds is that the exemptive relief would no longer apply.

(providing that an index that is a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months pursuant to Section 3(a)(55)(C)(iii) shall not be a narrow-based security index for the three following calendar months).

<sup>36</sup> The Commission has previously noted that liquidity is an important factor when determining whether a security is readily susceptible to manipulation. *See, e.g.*, Publication or Submission of Quotations Without Specified Information, Exchange Act Release No. 89891 (Sept. 16, 2020), 85 FR 68124, 68158 (Oct. 27, 2020) (“Further, the Commission believes that the exception’s three thresholds of ADTV value, total assets, and shareholders’ equity are tailored to appropriately capture issuers of securities that are less susceptible to fraud and manipulation based on the liquidity of the security and size of the issuer.”). *See also* Short Sales, Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 63004 (Nov. 6, 2003) (“The proposed pilot program would suspend the operation of the proposed bid test provision for selected stocks that the Commission believes are less susceptible to manipulation because they are more liquid and have a high market capitalization.”); Concept Release on Short Sales, Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996, 58000 (Oct. 28, 1999) (“Some of the Commission’s anti-manipulation rules assume that highly liquid securities are less vulnerable to manipulation and abuse than securities that are less liquid.”); Joint Order Excluding Indexes Comprised of Certain Index Options from the Definition of Narrow-Based Security Index pursuant to Section 1a(25)(B)(vi) of the Commodity Exchange Act and Section 3(a)(55)(C)(vi) of the Securities Exchange Act of 1934, Exchange Act Release No. 49469 (Mar. 25, 2004), 69 FR 16900, 16901 (Mar. 31, 2004) (“2004 Joint Order”) (“In addition, the Commissions believe that futures contracts on indexes that satisfy the conditions of this exclusion should not be readily susceptible to manipulation because of the composition, weighting, and liquidity of the securities in the Underlying Broad-Based Security Index and the liquidity that the options comprising the index must have to qualify for the exclusion.”).

#### i. Conditions Related to the SPIKES Calculation, Including the Liquidity and Trading Venue of the Required Inputs

The first condition of this exemptive order requires that SPIKES measure the magnitude of changes in the level of the price of the units of the SPY over a defined period of time, which magnitude is calculated using the prices of options on the SPY and represents: (a) An annualized standard deviation of percent changes in the price of the units of the SPY; (b) an annualized variance of percent changes in the price of the units of the SPY; or (c) on a non-annualized basis either the standard deviation or the variance of percent changes in the price of the units of the SPY. This condition, which is similar to one that is included in prior volatility index orders (which apply to volatility indexes that measure the expected 30-day volatility of broad-based security indexes), is designed to limit the exemption to volatility indexes calculated using one of two commonly recognized statistical measurements that show the degree to which an individual value tends to vary from an average value.<sup>37</sup>

The order also contains four conditions designed to measure both the volume and venue of trading in the SPY and SPY options, which are as follows:<sup>38</sup>

(1) The average daily dollar volume in the units of the SPY must be at least \$10 billion calculated over the preceding 180 days.<sup>39</sup>

(2) Units of the SPY must be listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

(3) The aggregate average daily notional volume in options on the SPY

<sup>37</sup> *See* 2004 Joint Order, *supra* note 36; Joint Order to Exclude Indexes Composed of Certain Index Options from the Definition of Narrow-Based Security Index Pursuant to Section 1a(25)(B)(vi) of the Commodity Exchange Act and Section 3(a)(55)(C)(vi) of the Securities Exchange Act of 1934, Exchange Act Release No. 61020 (Nov. 17, 2009), 74 FR 61116 (Nov. 23, 2009).

<sup>38</sup> To determine the liquidity thresholds relating to the SPY and its component options, Commission staff reviewed data from the equity consolidated data feeds, namely the UTP Trade Data Feed (UTDF) and the Consolidated Tape System (CTS), and the Options Price Reporting Authority (OPRA), as collected by the Commission’s Market Information Data Analytics System (MIDAS) for the six-month period beginning in October 2019. Specifically, these thresholds were determined by identifying the level at which at least 90% of the values exceeded such level.

<sup>39</sup> For the 180 days ending on October 14, 2020, the average daily dollar volume in the units of the SPY was approximately \$13.7 billion.

must be at least \$400 million calculated over the preceding 180 days.<sup>40</sup>

(4) Options on the SPY must be listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

Although the Commission has retained its ability to exercise anti-fraud and anti-manipulation authority in connection with the Product, certain aspects of how SPIKES is designed should help to ensure that the need to use such authority is limited. For example, the fact that the SPY is one of the most liquid securities in the world, and is therefore likely to be not readily susceptible to manipulation, should minimize the possibility of market participants using the Product as a surrogate for trading in the SPY in order to avoid application of the Federal securities laws. Similarly, the significant liquidity of SPY options, in the aggregate, and the fact that such options are traded on 16 different national securities exchanges, supports the conclusion that the securities used to compute the SPIKES also should not be readily susceptible to manipulation. Finally, the fact that the SPY and its component options are traded on a national securities exchange—and must continue to be so—helps to ensure that pricing information is current, accurate, and publicly available, and that trading is appropriately surveilled.

#### ii. Conditions on the Relationship Between the SPY and the S&P 500 Index

As previously noted, SPIKES differs from other volatility products currently trading in the market in that while such other products measure the expected 30-day volatility of the S&P 500 Index, a broad-based security index,<sup>41</sup> SPIKES measures the expected 30-day volatility of the SPY, a single security. Although the stated investment objective of the SPY is to provide investment returns that, before expenses, correspond generally to the price and yield performance of the S&P 500 Index,<sup>42</sup> we generally do not believe it appropriate to “look through” to an issuer’s holdings in order to treat the issuer’s security as an index for purposes of determining the status of a futures contract.

At the same time, however, the Commission recognizes the importance of fostering competition in the volatility

<sup>40</sup> For the 180 days ending on October 14, 2020, the aggregate average daily notional volume in options on the SPY was \$1,369 million.

<sup>41</sup> *See supra* note 37.

<sup>42</sup> *See* State Street Global Advisors Fact Sheet: SPDR® S&P 500® ETF Trust, available at: <https://www.ssga.com/library-content/products/factsheets/etfs/us/factsheet-us-en-spy.pdf>.

markets, in a manner that is consistent with the protection of investors. Specifically, the introduction of an additional volatility product in the market should lower transaction costs for market participants. Those competitive benefits animate the Commission's decision to exempt SPIKES futures from the definition of security future—subject to certain exceptions and conditions—under these limited and factually-specific circumstances. Those facts and circumstances include, among other things, the liquidity of the SPY (and options on the SPY), as previously discussed, and the historical performance of the SPY in tracking the performance of the S&P 500 Index. Accordingly, this order includes a number of conditions designed to protect investors should significant deviations between the SPY and the S&P 500 Index materialize. The Commission believes that if any of those conditions are no longer satisfied, it could suggest a dislocation between the SPY and its underlying index large enough to call into question whether the Product would continue to be a competitor to volatility products that measure the expected 30-day volatility of the S&P 500 Index.

The first two of these conditions address the structure and holdings of the SPY, and are as follows:

- The SPY is a unit investment trust (“UIT”), as defined in Section 4(2) of the Investment Company Act of 1940, and is registered with the Commission as an investment company under the Investment Company Act of 1940.<sup>43</sup>
- The SPY holds a portfolio of common stocks designed to provide investment returns that, before expenses, correspond generally to the price and yield performance of the S&P 500 Index.

A UIT is an investment company organized under a trust indenture or similar instrument that issues redeemable securities, each of which represents an undivided interest in a unit of specified securities. By statute, a UIT is unmanaged and its portfolio is fixed.<sup>44</sup> Substitution of securities may take place only under certain predefined circumstances. A UIT does not have a board of directors, corporate officers, or an investment adviser to render advice during the life of the trust. Exchange-Traded Funds (“ETFs”) organized as UITs (e.g., the SPY) operate pursuant to

exemptive orders issued by the Commission.<sup>45</sup> Under these circumstances, the Commission believes that the SPY's status as a UIT, together with the condition addressing its investment objective and the composition of its portfolio, appropriately limit the possibility that the SPIKES would be based on the SPY at a time when the SPY is pursuing a different investment strategy, given that the SPY, as a UIT, must be an unmanaged investment vehicle with a fixed portfolio.

Notwithstanding the legal requirements limiting the scope of the SPY's investment objective, circumstances may ultimately arise impacting the relationship between the SPY and the S&P 500 Index, particularly during times of market volatility. Accordingly, this order contains a number of conditions designed to protect investors should a tracking error between the SPY and its underlying index materialize.

Specifically, this order contains two tracking error conditions, one of which compares the net asset value (“NAV”) of the SPY to the S&P 500 Index, and the other compares the NAV of the SPY to its official closing price.<sup>46</sup> The Commission is bifurcating the tracking error requirements in this manner—as opposed to simply comparing the official closing price of the SPY to the S&P 500 Index—to account for situations when a tracking error is quickly resolved and able to be netted, thereby allowing the exemptive relief to remain in effect. The Commission also is including two notice requirements designed to serve as an early warning to the Commission of a deviation between the NAV of the SPY and the corresponding returns of the S&P 500 Index, or between the NAV of the SPY and its official closing price. Each of

those requirements is discussed in detail below.

The first tracking error condition requires that the annualized tracking error between the NAV of the SPY and the S&P 500 Index not meet or exceed 1%.<sup>47</sup> This condition, however, also provides that if over two consecutive trading days the returns used to calculate annualized tracking error can be netted, such that the annualized tracking error falls below 1%, then any such exceedance shall be deemed not to have occurred on those two consecutive trading days for purposes of this condition. For purposes of this condition, the term “annualized tracking error” should be calculated by taking the weekly return differences between the NAV of the SPY and the S&P 500 Index for the trailing 12 months (with each week beginning and ending on a Friday), taking into account dividends (as applicable), and then multiplying the standard deviation of those return differences by the square root of 52.

The Commission believes it important to provide some flexibility in circumstances when a large tracking error between the NAV of the SPY and the S&P 500 Index is quickly resolved. As a result, this condition will not be considered to have been breached if the tracking error falls below the 1% threshold when netted consecutive weekly returns are used to recalculate annualized tracking error. In addition, the Commission has decided to use an annualized measure for this condition in order to capture only those tracking errors that are large enough or so sustained (or both) that they result in a breach of the 1% threshold for an entire year.

The second tracking error condition requires that the official closing price of the SPY not deviate from the NAV of the SPY by more than 20 basis points for five or more consecutive trading days.<sup>48</sup> As a general matter, ETFs (including the SPY) are structured in such a way to help ensure that the NAV per share of

<sup>43</sup> See Exchange-Traded Funds, Investment Company Act Release No. 33140 (June 28 2018), 83 FR 37332, 37336 n. 37 (July 31, 2018) (further explaining, in the context of UITs that are ETFs, that “[b]ecause a UIT must invest in ‘specified securities,’ the investment strategies that a UIT ETF can pursue are limited. All UIT ETFs today seek to track the performance of an index by investing in the component securities of the index in the same approximate proportions as in the index (i.e., “replicating” the index). The trustee of an UIT ETF may make adjustments to the ETF's portfolio only to reflect changes in the composition of the underlying index”) (internal citations omitted).

<sup>46</sup> The tracking error conditions set forth below have been designed solely for the purposes of this order. The methodologies and thresholds discussed herein are specific to the facts and circumstances of this exemptive order and should not be viewed as precedent for any other purposes, including as it relates to the regulation of investment companies under the Investment Company Act of 1940.

<sup>47</sup> To determine the threshold for the comparison between the NAV of the SPY and the S&P 500 Index, Commission staff reviewed the annualized NAV tracking error, as provided by Bloomberg, between January 2008 and October 2020, which was generally below 1%.

<sup>48</sup> To determine the threshold for the comparison between the NAV of the SPY and the closing auction price, Commission staff reviewed Bloomberg data between January 2008 and October 2020. Based on that review, it appears that the average difference over time is close to zero. Those differences do vary on a day-to-day basis, however, with the standard deviation of those differences being approximately 10 basis points, which suggests that the closing auction price of the SPY has historically been within 20 basis points of its NAV approximately 95% of the time.

<sup>43</sup> 15 U.S.C. 80a–4(2).

<sup>44</sup> See Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25 2019), 84 FR 57162 n. 42 (Oct. 24, 2019) (“ETF Adopting Release”).

an ETF remains at or close to its market price per share.<sup>49</sup> Accordingly, deviations between the SPY's NAV and its official closing price that exceed 20 basis points and that persist for five or more consecutive trading days should generally not occur.<sup>50</sup> For purposes of both this requirement and the notice requirement discussed below, the "official closing price" of the SPY should be determined pursuant to the rules of its primary listing exchange.

Finally, the order is conditioned on MGEX providing the Commission with notice of certain tracking error issues. Specifically, MGEX is required to monitor the daily closing prices and the SPY's NAV and the corresponding returns of the S&P 500 Index. If (i) at any time the annualized tracking error between the NAV of the SPY and the S&P 500 Index exceeds 0.5% or (ii) for two or more consecutive trading days the official closing price of the SPY deviates from the NAV of the SPY by more than 20 basis points, MGEX must: (A) Promptly notify the Commission of such divergence, in a form and manner acceptable to the Commission, and (B) conduct an investigation in an attempt to determine its cause. As with the other tracking error conditions, the notice requirement is intended to identify situations where a divergence between the SPY and the S&P 500 could result in the Product no longer serving as a viable competitor to existing volatility products, which would undermine the basis for providing this relief.

The events that trigger the notice requirements largely mirror the two tracking error conditions described above. However, the threshold for the annualized tracking error between the NAV of the SPY and the S&P 500 Index is 0.5% for purposes of this notice requirement, rather than 1%. With respect to the deviation between the official closing price of the SPY and the NAV of the SPY, the time period is two or more consecutive trading days, rather than five or more consecutive trading days. These more restrictive thresholds reflect the fact that they trigger only a notice requirement, as opposed to resulting in the exemptive relief no longer applying. Those thresholds also

are consistent with our view of the importance of providing the Commission and MGEX with an early warning of one or more divergences that could undermine the basis for the relief set forth in this exemptive order.

### C. Securities Act Status

Section 5 of the Securities Act provides that any offer or sale of a security, including a security futures product, must either be registered under the Securities Act or made pursuant to an exemption from registration.<sup>51</sup> Section 3(a)(14) of the Securities Act provides an exemption from the registration requirements of Section 5 of the Securities Act for any security futures product that is: (i) Cleared by a clearing agency registered under section 17A of the Exchange Act or exempt from registration under subsection (b)(7) of such section 17A, and (ii) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the Exchange Act.<sup>52</sup> A security futures product that satisfies the conditions of the Section 3(a)(14) exemption remains subject to the anti-fraud provisions of Section 17 of the Securities Act.<sup>53</sup>

Although the statutory exemption contained in Section 3(a)(14) of the Securities Act is effective by operation of law, and therefore does not require Commission action, for the avoidance of doubt we are confirming our view that MGEX will be able to rely on that exemption to offer and sell the Product, as follows. First, MGEX will need to register with the Commission as a national securities exchange under Section 6(g) of the Exchange Act due to the fact that the exemption from the definition of security future does not apply to the registration requirements in Section 5 of the Exchange Act. Second, because the exemptive relief also does not apply to Section 17A of the Exchange Act, and the rules and regulations thereunder, MGEX (which will also clear the Product) will be able to avail itself of the statutory exemption from registration as a clearing agency in Section 17A(b)(7),<sup>54</sup> given that it is

regulated directly by the CFTC as both a DCM and as a DCO.<sup>55</sup>

### III. Conclusion

*It is hereby ordered*, pursuant to section 36 of the Securities Exchange Act of 1934 ("Exchange Act"), that a contract of sale for future delivery on the SPIKES™ Index ("SPIKES") trading on the Minneapolis Grain Exchange, Inc. (or any successor thereto) ("MGEX") (such futures contracts (and any options thereon) hereinafter referred to as the "Product") shall be exempt from the definition of "security future" in Section 3(a)(55) of the Exchange Act for all purposes under the Exchange Act, other than the following:

(1) The anti-fraud and anti-manipulation provisions of the Exchange Act (including related investigative, enforcement, and procedural authority) in Sections 9, 10, 15(c), 20, 20A, 21, 21A, 21B, 21C, 21D, 26, and 27,<sup>56</sup> and the rules and regulations thereunder;

(2) the requirement that MGEX register with the Securities and Exchange Commission ("Commission") as a national securities exchange, as set forth in Section 5 of the Exchange Act, and the rules and regulations thereunder, and the requirements applicable to national securities exchanges, as set forth in Section 6 of the Exchange Act, and the rules and regulations thereunder, including Section 6(g) and Exchange Act Rule 6a-4 (17 CFR 240.6a-4); *provided, however*, that once registered with the Commission as a national securities exchange, MGEX shall be exempt from all other requirements contained in Section 6 of the Exchange Act solely as they relate to transactions in the Product;

(3) Section 17(a) of the Exchange Act, and the rules and regulations thereunder (including Exchange Act Rule 17a-1 (17 CFR 240.17a-1)), as it relates to the obligation of MGEX, in its capacity as a national securities exchange, to make and keep records relating to transactions in the Product, furnish such copies thereof, and to make and disseminate such reports available

functions of a clearing agency with respect to security futures products effected pursuant to the rules of the designated contract market with which such agency is associated, is exempted from the provisions of this section and the rules and regulations thereunder."

<sup>55</sup> The Commission notes that the other requirements of the exemption from registration as a clearing agency set forth in Section 17A(b)(7) of the Exchange Act do not apply with respect to transactions in the Product, given that it will be cash settled and cleared only by MGEX.

<sup>56</sup> 15 U.S.C. 78(i), (j), o(c), t, t-1, u, u-1, u-2, u-3, u-4, z, and aa.

<sup>49</sup> See ETF Adopting Release, 84 FR at 57165 ("[t]he combination of the creation and redemption process with secondary market trading in ETF shares and underlying securities provides arbitrage opportunities that are designed to help keep the market price of ETF shares at or close to the NAV per share of the ETF.")

<sup>50</sup> See ETF Adopting Release, 84 FR at 57173 n.119 ("[i]n an analysis of various asset classes during 2017–2018, end-of-day deviations between closing price of ETFs and NAV were relatively rare and generally not persistent.") (internal citations omitted).

<sup>51</sup> 15 U.S.C. 77e.

<sup>52</sup> 15 U.S.C. 77c(a)(14).

<sup>53</sup> See Section 17(c) of the Securities Act. 15 U.S.C. 777(c) (providing that "[t]he exemptions provided in section 3 shall not apply to the provisions of this section").

<sup>54</sup> 17 U.S.C. 78q-1(b)(7)(A). Subsection (b)(7) provides, in part, that "[a] clearing agency that is regulated directly or indirectly by the CFTC through its association with a designated contract market for security futures products that is a national securities exchange registered pursuant to [Section 6(g) of the Exchange Act], and that would be required to register pursuant to [Section 17A(b)(1) of the Exchange Act] only because it performs the



to the Commission (or its representatives), upon request;

(4) Section 17(b) of the Exchange Act, and the rules and regulations thereunder, as it relates to the obligation of MGEX, in its capacity as a national securities exchange, to make itself available to inspection and examination by the Commission (or its representatives), upon request; and

(5) the requirement that MGEX register with the Commission as a clearing agency, as set forth in Section 17A of the Exchange Act, and the rules and regulations thereunder, including the exemption from registration in paragraph (b)(7) of that section.

Such exemptions are subject to the conditions set forth below. To the extent that one or more of these conditions is no longer satisfied, the exemptions set forth in this order will no longer apply three calendar months after the end of the month in which any condition was no longer satisfied.

(1) SPIKES measures the magnitude of changes in the level of the price of the units of the SPDR® S&P 500® ETF Trust ("SPY") over a defined period of time, which magnitude is calculated using the prices of options on the SPY and represents: (a) An annualized standard deviation of percent changes in the price of the units of the SPY; (b) an annualized variance of percent changes in the price of the units of the SPY; or (c) on a non-annualized basis either the standard deviation or the variance of percent changes in the price of the units of the SPY.

(2) The average daily dollar volume in the units of the SPY is at least \$10 billion calculated over the preceding 180 days.

(3) Units of the SPY are listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

(4) The aggregate average daily notional volume in options on the SPY is at least \$400 million calculated over the preceding 180 days.

(5) Options on the SPY are listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

(6) The SPY is a "unit investment trust," as defined in Section 4(2) of the Investment Company Act of 1940, and is registered with the Commission as an investment company under the Investment Company Act of 1940.

(7) The SPY holds a portfolio of common stocks designed to provide investment returns that, before expenses, correspond generally to the price and yield performance of the S&P 500 Index.

(8) The annualized tracking error between the net asset value ("NAV") of the SPY and the S&P 500 Index does not meet or exceed 1%; *provided, however*, that if over two consecutive trading days the returns used to calculate annualized tracking error can be netted, such that the annualized tracking error falls below 1%, then any such exceedance shall be deemed not to have occurred on those two consecutive trading days for purposes of this condition. For purposes of this condition, the term "annualized tracking error" should be calculated by taking the weekly return differences between the NAV of the SPY and the S&P 500 Index for the trailing 12 months (with each week beginning and ending on a Friday), taking into account dividends (as applicable), and then multiplying the standard deviation of those return differences by the square root of 52.

(9) The official closing price of the SPY, as determined pursuant to the rules of its primary listing exchange, does not deviate from the NAV of the SPY by more than 20 basis points for five or more consecutive trading days.

(10) MGEX shall monitor the daily closing prices and the NAV of the SPY and the corresponding returns of the S&P 500 Index. If (i) at any time the annualized tracking error between the NAV of the SPY and the S&P 500 Index exceeds 0.5% or (ii) for two or more consecutive trading days the official closing price of the SPY, as determined pursuant to the rules of its primary listing exchange, deviates from the NAV of the SPY by more than 20 basis points, MGEX shall (A) promptly notify the Commission of such divergence, in a form and manner acceptable to the Commission, and (B) conduct an investigation in an attempt to determine its cause.

Dated: November 24, 2020.

By the Commission.

**Vanessa A. Countryman,**

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90495; File No. SR-NYSE-2020-95]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and Make Related Changes to Rules 7.32, 7.35C, 46B, and 47

November 24, 2020.

Pursuant to Section 19(b)(1) <sup>1</sup> of the Securities Exchange Act of 1934 ("Act") <sup>2</sup> and Rule 19b-4 thereunder, <sup>3</sup> notice is hereby given that, on November 13, 2020, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make permanent Commentaries .01(a) and (b) and .06 to Rule 7.35A and Commentaries .01 and .03 to Rule 7.35B and make related changes to Rules 7.32, 7.35C, 46B, and 47. The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.



*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to make permanent Commentaries .01(a) and (b) and .06 to Rule 7.35A (DMM-Facilitated Core Open and Trading Halt Auctions) and Commentaries .01 and .03 to Rule 7.35B (DMM-Facilitated Closing Auctions) and make related changes to Rules 7.32 (Order Entry), 7.35C (Exchange-Facilitated Closing Auctions), 46B (Regulatory Trading Official), and 47 (Floor Officials—Unusual Situations).

Background

In connection with the closing of the Trading Floor facilities located at 11 Wall Street in New York City as of March 23, 2020 and moving the Exchange, on a temporary basis, to fully electronic trading,<sup>4</sup> and subsequent reopening of the Trading Floor on a limited basis first to Floor Brokers on May 26, 2020<sup>5</sup> and then to DMMs on June 15, 2020,<sup>6</sup> the Exchange added Commentaries .01 and .06 to Rule 7.35A and Commentaries .01 and .03 to 7.35B.<sup>7</sup> Currently, these Commentaries are in effect until the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020.<sup>8</sup>

Specifically, Commentary .01 to Rule 7.35A provides:

<sup>4</sup> Pursuant to Rule 7.1(e), the CEO notified the Board of Directors of the Exchange of her determination under Rule 7.1(c)(3). The Exchange's rules establish how the Exchange will function fully-electronically. See Press Release, dated March 18, 2020, available here: <https://ir.theice.com/press/press-releases/all-categories/2020/03-18-2020-204202110>.

<sup>5</sup> See Securities Exchange Act Release No. 88933 (May 22, 2020), 85 FR 32059 (May 28, 2020) (SR-NYSE-2020-47) (Notice of filing and immediate effectiveness of proposed rule change).

<sup>6</sup> See Securities Exchange Act Release No. 89086 (June 17, 2020) (SR-NYSE-2020-52) (Notice of filing and immediate effectiveness of proposed rule change).

<sup>7</sup> See Securities Exchange Act Release Nos. 88444 (March 20, 2020), 85 FR 17141 (March 26, 2020) (SR-NYSE-2020-22) (amending Rules 7.35A to add Commentary .01, 7.35B to add Commentary .01, and 7.35C to add Commentary .02) and 89086 (June 17, 2020), 85 FR 37712 (SR-NYSE-2020-52) (amending Rules 7.35A to add Commentary .06, 7.35B to add Commentary .03, 76 to add Supplementary Material 20, and Supplementary Material .30 to Rule 36).

<sup>8</sup> See Securities Exchange Act Release No. 90005 (September 25, 2020), 85 FR 61999 (October 1, 2020) (SR-NYSE-2020-78) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C; and temporary rule relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020).

For a temporary period that begins March 23, 2020, when the Trading Floor facilities have been closed pursuant to Rule 7.1(c)(3), and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020:

(a) The percentage price parameters in paragraph (c)(1)(G) and (c)(2) of this Rule are suspended and a DMM may not effect a Core Open or Trading Halt Auction electronically if the Core Open or Trading Halt Auction Price will be more than 10% away from the Consolidated Last Sale Price.

(b) The volume parameters in paragraph (c)(1)(H) of this Rule are suspended.

(c) The requirement to publish a pre-opening indication pursuant to paragraph (d) of this Rule before either a Core Open or Trading Halt Auction is suspended.

Commentary .06 to Rule 7.35A provides:

For a temporary period that begins on June 17, 2020 and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020, the Applicable Price Range specified in paragraphs (d)(3)(A) and (B) of this Rule is suspended and the Applicable Price Range will be 10% for securities with an Indication Reference Price higher than \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00.

Commentary .01 to Rule 7.35B provides:

For a temporary period that begins March 23, 2020, when the Trading Floor facilities have been closed pursuant to Rule 7.1(c)(3), and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020:

(a) The percentage price parameters in paragraph (c)(1)(G) of this Rule are suspended and a DMM may not effect a Closing Auction electronically if the Closing Auction Price will be more than 10% away from the Exchange Last Sale Price.

(b) The volume parameters in paragraph (c)(1)(H) of this Rule are suspended.

Finally, Commentary .03 to Rule 7.35B provides:

For a temporary period that begins on June 17, 2020 and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020, Floor Broker Interest will not be eligible to participate in the Closing Auction.

Proposed Rule Changes

Proposed Changes to Parameters for DMM-Facilitated Electronic Auctions

The Exchange proposes to make permanent the parameters for DMM-facilitated electronic auctions that are currently in effect on a temporary basis as set forth in Commentaries .01(a) and (b) to Rule 7.35A and Commentary .01 to Rule 7.35B.

Current Rules 7.35A(c)(1)(G) and (H) provide that a DMM may not effect a Core Open or Trading Halt Auction electronically if (i) the Auction Price will be more than 4% away from the Consolidated Last Sale Price,<sup>9</sup> or (ii) the paired volume for the Auction will be more than 1,500 round lots for securities with an average opening volume of 1,000 round lots or fewer in the previous calendar quarter, or 5,000 round lots for securities with an average opening volume of over 1,000 round lots in the previous calendar quarter. Rule 7.35A(c)(2) further provides that if as of 9:00 a.m., the E-mini S&P 500 Futures are +/– 2% from the prior day's closing price of the E-mini S&P 500 Futures, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market, a DMM may effect an opening or reopening electronically if the Auction Price will be up to 8% away from Consolidated Last Sale Price, without any volume limitations.

Current Rule 7.35B(c)(1)(G) and (H) provide that a DMM may not effect a Closing Auction electronically if (i) the Auction Price will be more than a designated percentage away from the Exchange Last Sale Price,<sup>10</sup> or (ii) the paired volume for the Closing Auction will be more than 1,000 round lots for such security. The designated percentages are currently as follows:

| Exchange last sale price | Designated percentage |
|--------------------------|-----------------------|
| \$25.00 and below .....  | 5%                    |
| \$25.01 to \$50.00 ..... | 4%                    |
| Above \$50.00 .....      | 2%                    |

The Exchange proposes to make the price percentage parameter 10% and eliminate the volume restrictions for all DMM-facilitated Auctions. These

<sup>9</sup> The term "Consolidated Last Sale Price" is defined in Rule 7.35 to mean the most recent consolidated last-sale eligible trade in a security on any market during Core Trading Hours on that trading day, and if none, the Official Closing Price from the prior trading day for that security.

<sup>10</sup> The term "Exchange Last Sale Price" is defined in Rule 7.35 to mean the most recent trade on the Exchange of a round lot or more in a security during Core Trading Hours on that trading day, and if none, the Official Closing Price from the prior trading day for that security.

parameters are currently in effect on a temporary basis pursuant to Commentaries .01(a) and (b) to Rule 7.35A and Commentary .01 to Rule 7.35B. The Exchange believes that making these temporary Commentaries permanent would promote fair and orderly DMM-facilitated Auctions.

In particular, DMMs have been operating with the temporary parameters for Core Open, Trading Halt Auctions, and Closing Auctions since March 23, 2020. Accordingly, these temporary parameters have been in effect not only during the period when the Trading Floor was closed in full, but also for the period when the Trading Floor has partially reopened to reduced staff of DMM and Floor brokers firms. In addition, these temporary parameters have been in effect during periods of both extreme volatility and high trading volumes. Accordingly, DMMs have had over six months' of experience of electronically facilitating Auctions within these temporary parameters and apply them during varying market conditions.

The Exchange has observed that during the period when these temporary parameters have been in effect, DMMs have facilitated more Core Open Auctions electronically, resulting in a higher percentage of Core Open Auctions occurring within two seconds of 9:30 a.m. Eastern Time. For example, in February 2020, which was before the Trading Floor closed, DMMs effected electronically 85.9% of all Core Open Auctions and 75.9% of Core Open Auctions in S&P 500 securities. By contrast, for the period July 2020 through October 2020, after when DMMs had returned to the Trading Floor, DMMs effected electronically 96% of all Core Open Auctions and 89.6% of Core Open Auctions in S&P 500 securities. The increased number of DMM electronically-facilitated Core Open Auctions has resulted in more Core Open Auctions occurring close to the beginning of Core Trading Hours. For example, in February 2020, 85.9% of all Core Open Auctions, and 75.9% of Core Open Auctions in S&P 500 securities, occurred within two seconds of 9:30 a.m. Eastern Time. By contrast, for the period July 2020 through October 2020, 95.9% of all Core Open Auctions, and 89.6% of Core Open Auctions in S&P 500 securities, occurred within two seconds of 9:30 a.m. Eastern Time.

The Exchange has observed similar trends for Closing Auctions, with DMMs facilitating more Closing Auctions electronically, which means more Closing Auctions occurring closer to 4:00 p.m. Eastern Time. In February 2020, DMMs effected electronically 57%

of all Closing Auctions and 5.5% of Closing Auctions in S&P 500 securities. By contrast, for the period July 2020 through October 2020, DMMs effected electronically 90.9% of all Closing Auctions, and 53.6% of Closing Auctions in S&P 500 securities. Currently, DMM electronically-facilitated Closing Auctions occur shortly after 4:00 p.m. Eastern Time.<sup>11</sup> Accordingly, the increased number of DMM electronically-facilitated Closing Auctions translates to an increase in the number of Closing Auctions that occur close to 4:00 p.m. Eastern Time. Because the temporary wider percentage parameters and eliminated volume parameters have resulted in more Core Open Auctions and Closing Auctions occurring at 9:30 a.m. Eastern Time or 4:00 p.m. Eastern Time, respectively, the Exchange believes that making these temporary parameters permanent would support the continued fair and orderly operation of Auctions on the Exchange.

The Exchange also notes that during the period when the temporary parameters have been in place, the Exchange has not observed greater auction price dislocation compared to the period immediately preceding implementation of these temporary parameters, and has even observed modest improvement. The Exchange defines auction price dislocation as the difference between the Core Open Auction price and the consolidated volume-weighted average price ("VWAP") over the subsequent five-minute period, or the difference between the Closing Auction price and the consolidated VWAP over the two minutes preceding the Closing Auction; the lower the difference, the lower the auction price dislocation. In February 2020, the Exchange's average Core Open Auction dislocation was 3.27x a security's average spread; for the period July 2020 through October 2020 the average was 3.22x a security's average spread.<sup>12</sup> Similarly, the median Core

<sup>11</sup> When Floor Broker Interest was eligible to participate in the Closing Auction, DMM electronically-facilitated Closing Auctions occurred at 4:02 p.m. Eastern Time. Because there has been no Floor Broker Interest for the Closing Auction during the period while the Trading Floor has been temporarily closed, the Exchange moved the time for DMM electronically-facilitated Closing Auctions to closer to 4:00 p.m. With the proposed change, described below, to permanently eliminate Floor Broker Interest for the Closing Auction, the Exchange would continue to conduct DMM electronically-facilitated Closing Auctions shortly after 4:00 p.m., rather than revert to the 4:02 p.m. time for such auctions.

<sup>12</sup> Market volatility was, on average, lower in February 2020 as compared to July 2020–October 2020. Calculating the price dislocation metric in terms of a security's average spread incorporates the wider spreads in the latter period and allows for a better comparison between the two periods.

Open Auction dislocation fell from 1.84x a security's average spread to 1.78x a security's average spread.

The Exchange also observed similar trends in the Closing Auction price dislocation statistics. In February 2020, the Exchange's average Closing Auction Price Dislocation was 0.82x a security's average spread; for the period July 2020 through October 2020, the average was 0.69x a security's average spread.<sup>13</sup> Median Closing Auction dislocation also dropped from 0.5x to 0.43x a security's average spread in the respective periods. Because the temporary wider percentage parameters have not resulted in greater auction price dislocation, the Exchange believes that making these parameters permanent would continue to support fair and orderly Auctions on the Exchange.

To effect these changes, the Exchange proposes to:

- Amend Rule 7.35A(c)(1)(G) to replace the current 4% price parameter for Core Open and Trading Halt Auctions with a 10% price parameter. Because the proposed price parameter would be 10%, the Exchange believes that the need for the double-wide parameters set forth in Rule 7.35A(c)(2) for Core Open and Trading Halt Auctions would no longer be necessary and the Exchange proposes to delete that text.
- Delete Rule 7.35A(c)(1)(H).
- Amend Rule 7.35A(j)(1)(A) to delete reference to volume parameters and Rule 7.35A(c)(1)(H).
- Amend Rule 7.35B(c)(1)(G) to replace the reference to "designated percentage" parameter for the Closing Auction with a 10% price parameter. The Exchange further proposes to delete the chart specifying the designated percentages for the Closing Auction.
- Delete Rule 7.35B(c)(1)(H).
- Delete Commentaries .01(a) and (b) to Rule 7.35A.
- Delete the entirety of Commentary .01 to Rule 7.35B.

The Exchange proposes to maintain Commentary .01(c) to Rule 7.35A, which provides that for a temporary period that begins March 23, 2020, when the Trading Floor facilities have been closed pursuant to Rule 7.1(c)(3), and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020, the requirement to publish a pre-opening indication pursuant to Rule 7.35A(d) before either a Core Open Auction or Trading Halt

<sup>13</sup> Closing Auction price dislocation is generally lower than Core Open Auction price dislocation, due to the relatively lower levels of volatility around the Closing Auction compared to the Core Open Auction.

Auction is suspended. The Exchange proposes non-substantive amendments to delete subparagraph (c) numbering and move the text of that subparagraph into the body of Commentary .01.<sup>14</sup>

#### Proposed Changes to Applicable Price Range for Pre-Opening Indications

The Exchange proposes to make permanent that the Applicable Price Range for determining whether to publish a pre-opening indication would be 10% for securities with an Indication Reference Price higher than \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00, which are currently in effect on a temporary basis, as set forth in Commentary .06 to Rule 7.35A.

Rule 7.35A(d)(1)(A) currently provides that a DMM will publish a pre-opening indication before a security opens or reopens if the Core Open or Trading Halt Auction is anticipated to be a change of more than the “Applicable Price Range,” as specified in Rule 7.35A(d)(3), from a specified “Indication Reference Price,” as specified in Rule 7.35A(d)(2).

Rule 7.35A(d)(3)(A) provides that the Applicable Price Range will be 5% for securities with an Indication Reference Price over \$3.00 and \$0.15 for securities with an Indication Reference Price equal to or lower than \$3.00. Rule 7.35A(d)(3)(B) further provides that,

If as of 9:00 a.m., the E-mini S&P 500 Futures are  $\pm 2\%$  from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 7.12, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and order market, the Applicable Price Range for determining whether to publish a pre-opening indication will be 10% for securities with an Indication Reference Price over \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00.

Current Rule 7.35A(1)(A) further provides that a DMM may not effect a Core Open or Trading Halt Auction electronically if a pre-opening indication has been published for the Core Open Auction. Accordingly, Exchange Rules already provide for a correlation between pre-opening indications and whether a DMM may effect a Core Open or Trading Halt Auction electronically. Currently, that is

achieved through similar, though not identical, percentage parameters: The price parameter for DMM-facilitated electronic Core Open and Trading Halt Auctions is 4% and the Applicable Price Range for pre-opening indications is 5%. When there is market-wide volatility, both are doubled.

The Exchange believes that because of this existing correlation, in connection with permanently widening the price parameters for DMM-facilitated electronic Core Open and Trading Halt Auctions to 10%, the Applicable Price Range for determining whether to publish a pre-opening indication should similarly not only be widened, but also be aligned to 10%. With this proposed change, if there is a significant enough price movement to require a DMM to effect a Core Open or Trading Halt Auction manually, the DMM would be required to publish a pre-opening indication for such Core Open or Trading Halt Auction. The Exchange notes that if a DMM chooses to facilitate a Core Open Auction or Trading Halt Auction manually (*i.e.*, if there is less than a 10% price movement), a DMM could still choose to publish a pre-opening indication in connection with such Auction, even if the Applicable Price Range has not been triggered. For example, DMMs generally publish pre-opening indications for IPO Auctions and Direct Listing Auctions regardless of whether the Applicable Price Range has been triggered.

The Exchange does not believe that permanently widening the Applicable Price Range for when a DMM is required to publish a pre-opening indication would reduce transparency in connection with Core Open and Trading Halt Auctions. The Exchange currently disseminates Auction Imbalance Information for all Core Open Auctions and Trading Halt Auctions.<sup>15</sup> Since August 2019, when the Exchange transitioned Exchange-listed securities to the Pillar trading platform, all Floor broker orders for the Core Open and Trading Halt Auctions must be entered electronically. Accordingly, all such interest is reflected in the Auction Imbalance Information, which was not the case before the Exchange transitioned to Pillar. Accordingly, the

Auction Imbalance Information includes information about all buy and sell orders entered in advance of such Auctions.<sup>16</sup>

To effect this change, the Exchange proposes to amend Rule 7.35A(d)(3)(A) and (B) to make it a single subparagraph (A) that would provide that the Applicable Price Range for determining whether to publish a pre-opening indication would be 10% for securities with an Indication Reference Price over \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00. The Exchange further proposes to delete the introductory text to Rule 7.35A(d)(3)(B) regarding circumstances when the Exchange could widen the Applicable Price Range under the current Rule. The Exchange further proposes to delete Commentary .06 to Rule 7.35A.

#### Proposed Changes to Floor Broker Interest for the Closing Auction

The Exchange proposes to make permanent that Floor Broker Interest would not be eligible to participate in the Closing Auction, as set forth in Commentary .03 to Rule 7.35B. The term “Floor Broker Interest” is defined in Rule 7.35(a)(9) to mean orders represented orally by a Floor broker at the point of sale.

Rule 7.35B(a)(1) currently provides that Floor Broker Interest is eligible to participate in the Closing Auction provided that the Floor broker has electronically entered such interest before the Auction Processing Period for the Closing Auction begins. The Rule further provides that for such interest to be eligible to participate in the Closing Auction, a Floor broker must first, by the end of, but not after, Core Trading Hours, orally represent Floor Broker Interest at the point of sale, including symbol, side, size, and limit price, and then second, electronically enter such interest after the end of Core Trading Hours. Current Rules 7.35B(a)(1)(B) and (C) set forth additional requirements relating to electronic acceptance of such

<sup>16</sup> Rule 7.35(a)(4) provides that DMM Auction Liquidity is never included in Auction Imbalance Information. By its terms, DMM Auction Liquidity, as defined in Rule 7.35(d)(8)(A), is entered by the DMM either manually or electronically as part of the DMM unit's electronic message to conduct an Auction. For an Auction effected electronically by the DMM, DMM Auction Liquidity is entered simultaneously with the DMM facilitating the Auction, which is why it is not included in the Auction Imbalance Information leading up to such Auction. For an Auction effected manually by the DMM, the DMM can factor such interest into the pre-opening indication price range. DMM Orders, as defined in Rule 7.35(d)(8)(B), that may be entered by the DMM in advance of such Auctions would be included in the Auction Imbalance Information.

<sup>14</sup> The Exchange notes that even though the requirement for pre-opening indications has been suspended, since June 17, 2020, when DMMs returned staff to the Trading Floor, DMMs have published pre-opening indications for IPO Auctions and the two Direct Listing Auctions on September 30, 2020.

<sup>15</sup> Pursuant to Commentaries .01 and .02 to Rule 7.35, for the temporary period that ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020, the Exchange includes IPOs and Direct Listings in the Auction Imbalance Information. The Exchange has filed a separate proposed rule change to include IPOs and Direct Listings in the Auction Imbalance Information on a permanent basis. See Securities Exchange Act Release No. 90387 (November 10, 2020) (SR–NYSE–2020–93) (Notice of Filing).

interest by the DMM and circumstances when such interest can be cancelled.

On June 17, 2020, when the Exchange reopened the Trading Floor to limited numbers of DMMs, the Exchange added Commentary .03 to Rule 7.35B.

Accordingly, from June 17, 2020 to the present, even though reduced numbers of DMMs and Floor brokers are present on the Trading Floor, Floor Broker Interest has not been eligible to participate in the Closing Auction.

During this period, the Exchange has observed that even in the absence of Floor Broker Interest, Floor broker participation in Closing Auctions has returned to similar levels of Floor broker participation in the Closing Auction for the period before March 23, 2020. For example, in February 2020, 34.5% of Auction-Only Orders for the Closing Auction were entered as Closing D Orders, which are available only to Floor brokers.<sup>17</sup> In October 2020, 38.8% of the Auction-Only Orders for the Closing Auction were Closing D Orders, which demonstrates that Floor broker participation in the Closing Auction has not only returned since the Trading Floor reopened, but has actually increased as compared to February 2020. Moreover, in February 2020, only 0.1% of total Floor broker orders for the Closing Auction was represented as Floor Broker Interest, and that Floor Broker Interest represented less than 0.01% of the total interest that participated in the Closing Auction. Based on both the relatively small levels of Floor Broker Interest that was participating in the Closing Auction before the Trading Floor closed and the ongoing availability of Closing D Orders for Floor brokers, the Exchange does not believe that eliminating Floor Broker Interest for the Closing Auction would materially impact the ability of Floor brokers to represent customer orders for the Closing Auction.

Based on this experience, the Exchange proposes to make permanent Commentary .03 to Rule 7.35B. To effect this change, the Exchange proposes to amend Rule 7.35B(a)(1) to provide that Floor Broker Interest would not be eligible to participate in the Closing Auction. To provide clarity that a Floor broker would not be permitted to represent verbal interest intended for the Closing Auction, the Exchange

further proposes to provide that Floor brokers must enter any orders for the Closing Auction, as defined in Rule 7.31, electronically during Core Trading Hours. The Exchange believes that the cross-reference to Rule 7.31 in the Rule would provide notice to Floor brokers and their customers of which order types are available for electronic entry by Floor brokers for the Closing Auction, which include both Auction-Only Orders described in Rule 7.31(c) and other orders that may be resting on the Exchange Book that are eligible to participate in the Closing Auction. The Exchange also proposes to delete Commentary .03 to Rule 7.35B.

The Exchange proposes to make related changes by deleting the clause “and Floor Broker Interest intended for the Closing Auction as defined in Rule 7.35B(a)(1)” from Rule 7.32. Similarly, the Exchange proposes to delete the text set forth in Rule 7.35C(a)(2) relating to Floor Broker Interest that provides that “Floor Broker Interest that has been electronically accepted by the DMM and that has not been cancelled as provided for in Rule 7.35B(a)(1)(C) will be eligible to participate in an Exchange-facilitated Closing Auction.” The Exchange proposes to designate that subparagraph as “Reserved.”<sup>18</sup>

In addition, the Exchange proposes to delete Rule 46B and amend Rule 47(b). Under Rule 47, Floor Officials have the authority to “supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers or transactions on the Floor.” The Exchange recently amended its rules to add Regulatory Trading Officials (“RTO”), which are defined in Rule 46B.<sup>19</sup> As described in the RTO Approval Order, unusual situations that may arise in connection with Floor Broker Interest for the Closing Auction could be “if the Floor broker hand-held device malfunctions or ceases to work or if a Floor broker is physically impeded, as a result of a crowd condition beyond that of normal traffic flow on the Exchange’s trading Floor or some other circumstance beyond the Floor broker’s control, in his or her ability to be present at a post before the DMM closes the security.”<sup>20</sup> The Exchange amended Rule 47 to add subparagraph (b), which provides that RTOs, instead of Floor Officials, would be responsible for supervising and regulating situations regarding whether

a verbal bid or verbal offer is eligible for inclusion in the Closing Auction by the DMM.

Because the Exchange proposes to eliminate verbal bids or verbal offers for the Closing Auction, the Exchange proposes to delete the last clause of Rule 47(a) and subparagraph (b) to Rule 47.<sup>21</sup> As proposed, Rule 47 would revert to the rule text in effect prior to the RTO Approval Order and would provide that “Floor Officials shall have power to supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers or transactions on the Floor.” With this proposed change, RTOs would no longer have a role under Exchange rules. Therefore, the Exchange proposes to delete Rule 46B.

The Exchange also proposes to delete Commentary .02 to Rule 7.35B. This Commentary is obsolete because it has not been in effect since May 22, 2020.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,<sup>22</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>23</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

## Proposed Changes to Parameters for DMM-Facilitated Electronic Auctions

The Exchange believes that the proposed change to make permanent the parameters for DMM-facilitated electronic auctions that are currently in effect on a temporary basis as set forth in Commentaries .01(a) and (b) to Rule 7.35A and Commentary .01 to Rule 7.35B would remove impediments to and perfect the mechanism of a free and open market and a national market

<sup>17</sup> For Exchange-listed securities, Auction-Only Orders are defined in Rule 7.31 to mean a Limit or Market Order that is to be traded only in an auction pursuant to the Rule 7.35 Series. The Exchange accepts the following Auction-Only Orders for the Closing Auction: Limit-on-Close Order (“LOC Order”), Market-on-Close Order (“MOC Order”), Closing D Order, and Closing Imbalance Offset Orders. All four types of Auction-Only Orders are available to Floor brokers.

<sup>18</sup> The Exchange has a pending proposed rule change to amend Rule 7.35C(a). See (SR-NYSE-2020-89).

<sup>19</sup> See Securities Exchange Act Release No. 88765 (April 29, 2020), 85 FR 26771 (May 5, 2020) (SR-NYSE-2020-03) (“RTO Approval Order”).

<sup>20</sup> *Id.* at 26772.

<sup>21</sup> RTOs were approved when the Trading Floor was temporarily closed. *Id.* Because Commentary .03 to Rule 7.35B was implemented when DMMs returned to the Trading Floor, there has not been any Floor Broker Interest for Closing Auctions since RTOs were created and therefore RTOs have not had to perform the functions as described in Rule 46(b).

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

system because the Exchange believes that these updated parameters would promote fair and orderly Auctions on the Exchange. These temporary parameters have been in effect not only during the period when the Trading Floor was closed in full, but also for the period when the Trading Floor has partially reopened to reduced staff of DMM and Floor brokers firms. In addition, these temporary parameters have been in effect during periods of both extreme volatility and high trading volumes. Accordingly, DMMs have had over six months' of experience of electronically facilitating Auctions within these temporary parameters and applying them during varying market conditions.

During this period, the Exchange has observed that with these temporary parameters, a higher number of Core Open Auctions and Closing Auctions have been electronically facilitated by the DMM, which has resulted in a greater number of Core Open Auctions and Closing Auctions occurring shortly after 9:30 a.m. or 4:00 p.m., respectively. The Exchange has further observed that there have been modest improvements in auction price dislocation during the period when these temporary parameters have been in place. Accordingly, the Exchange believes that making these parameters permanent would promote the continued fair and orderly operation of Auctions for Exchange-listed securities.

#### Proposed Changes to Applicable Price Range for Pre-Opening Indications

The Exchange believes that the proposed change to make permanent that the Applicable Price Range for determining whether to publish a pre-opening indication would be 10% for securities with an Indication Reference Price higher than \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00, which are currently in effect on a temporary basis, would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Exchange believes that this updated Applicable Price Range would promote fair and orderly Auctions on the Exchange.

Exchange rules already provide for a correlation between the parameters for when a DMM may facilitate an Auction electronically and the Applicable Price Range for determining whether to disseminate a pre-opening indication. The Exchange believes that the proposed Applicable Price Range should be aligned with the Exchange's proposed parameters for when a DMM

may facilitate an Auction electronically. Specifically, with this proposed change, if there is a significant enough price movement to require a DMM to effect a Core Open or Trading Halt Auction manually, the DMM would be required to publish a pre-opening indication for such Core Open or Trading Halt Auction. The Exchange notes that if a DMM chooses to facilitate a Core Open Auction or Trading Halt Auction manually (*i.e.*, if there is less than a 10% price movement), a DMM could still choose to publish a pre-opening indication in connection with such Auction, even if the Applicable Price Range has not been triggered.

The Exchange does not believe that permanently widening the Applicable Price Range for when a DMM is required to publish a pre-opening indication would reduce transparency in connection with Core Open and Trading Halt Auctions. The Exchange currently disseminates Auction Imbalance Information for Core Open Auctions and Trading Halt Auctions. Since August 2019, when the Exchange transitioned Exchange-listed securities to the Pillar trading platform, all Floor broker orders for the Core Open and Trading Halt Auctions must be entered electronically. Accordingly, all such interest is reflected in the Auction Imbalance Information, which was not the case before the Exchange transitioned to Pillar. Accordingly, the Auction Imbalance Information includes information about all buy and sell orders entered in advance of such Auctions.

#### Proposed Changes to Floor Broker Interest for the Closing Auction

The Exchange believes that the proposed change to make permanent that Floor Broker Interest would not be eligible to participate in the Closing Auction, which is currently in effect on a temporary basis as set forth in Commentary .03 to Rule 7.35B, would remove impediments to and perfect the mechanism of a free and open market because it would promote fair and orderly Closing Auctions on the Exchange.

The Exchange has observed that even in the absence of Floor Broker Interest, Floor broker participation in the Closing Auction has returned, and indeed increased, as compared to the level of Floor broker participation in the Closing Auction for February 2020. Moreover, even when Floor Broker Interest was available to participate in Closing Auctions, such interest represented only 0.1% of total Floor broker orders that participated in Closing Auctions. Accordingly, the Exchange does not

believe that the proposed change would materially alter Floor brokers' ability to meaningfully participate in the Closing Auction. Moreover, in the absence of Floor Broker Interest, the Exchange was able to move the time for DMM-facilitated electronic Closing Auctions from 4:02 p.m. to shortly after 4:00. By making this change permanent, DMM-facilitated electronic Closing Auctions would continue to occur shortly after 4:00.

The Exchange further believes that the proposed amendments to Rules 7.32, 7.35, 46B, and 47(b) would remove impediments to and perfect the mechanism of a free and open market and a national market system because such rules would no longer be necessary in the absence of Floor Broker Interest for the Closing Auction. Accordingly, these proposed rule changes would promote transparency and clarity by removing references that would be obsolete.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>24</sup> the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issues. Instead, the proposed rule changes are designed to make permanent changes that have been implemented on a temporary basis relating to the functions of Auctions on the Exchange and that have contributed to the fair and orderly Auction process during the period that they have been in effect. The proposed rule change does not have any effect on intermarket competition because these proposed changes relate to Auctions in Exchange-listed securities for which the Exchange is the primary listing exchange.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or 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

<sup>24</sup> 15 U.S.C. 78f(b)(8).

reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-95 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-95. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File

Number SR-NYSE-2020-95 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26399 Filed 11-30-20; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90509; File No. SR-CboeEDGX-2020-056]

### Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend Its Early Trading Session

November 24, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 16, 2020, Cboe EDGX Exchange, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II, 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 extend its Early Trading Session. 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/](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.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to extend its Early Trading Session hours. The Exchange currently offers four distinct trading sessions where the Exchange accepts orders for potential execution: (1) The "Early Trading Session," which begins at 7:00 a.m. Eastern Time ("ET") and continues until 8:00 a.m. ET,<sup>3</sup> (2) the "Pre-Opening Session," which begins at 8:00 a.m. ET and continues until 9:30 a.m. ET,<sup>4</sup> (3) "Regular Trading Hours," which begin at 9:30 a.m. ET and continue until 4:00 p.m. ET,<sup>5</sup> and (4) the "Post-Closing Trading Session," which begins at 4:00 p.m. ET and continues until 8:00 p.m. ET.<sup>6</sup> Users<sup>7</sup> may designate when their orders are eligible for execution by selecting their desired Time-in-Force instruction.<sup>8</sup> The proposed rule change amends Rule 1.5(ii), which defines the Early Trading Session, to allowing trading to begin at 4:00 a.m. ET. In addition to this, the proposed rule change amends the time when orders may start to be entered into the System prior to the Early Trading Session in Rule 11.1(a)(1), from 6:00 a.m. ET to 3:30 a.m. ET. The proposed rule change also updates Rule 11.1(a)(1) and Rule 14.1(c)(2) to reflect the proposed Early Trading Session and order acceptance times, where applicable. Orders entered for participation in the Early Trading Session will continue to be handled in the same manner as they are today. The proposed rule change merely permits the Exchange to begin order acceptance and commence trading at earlier times, thereby providing additional time for market participants to source and access liquidity on the Exchange outside of Regular Trading Hours. The Exchange

<sup>3</sup> "Early Trading Session" means the time between 7:00 a.m. and 8:00 a.m. ET. See Rule 1.5(ii).

<sup>4</sup> "Pre-Opening Session" means the time between 8:00 a.m. and 9:30 a.m. ET. See Rule 1.5(s).

<sup>5</sup> "Regular Trading Hours" means the time between 9:30 a.m. and 4:00 p.m. ET. See Rule 1.5(y).

<sup>6</sup> "Post-Closing Trading Session" means the time between 4:00 p.m. and 8:00 p.m. ET. See Rule 1.5(r).

<sup>7</sup> "User" means any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3. See Rule 1.5(ee).

<sup>8</sup> See Rule 11.8.

<sup>25</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

therefore believes that amending Rule 1.5(ii) to extend the Exchange's trading hours will be benefit investors that will now be able to trade on the Exchange earlier in the day.

The Exchange notes that the extended Early Trading Session hours are consistent with the early trading session hours currently in place on other equities exchanges. For example, NYSE Arca Rule 7.34–E (a)(1) provides that NYSE Arca's early trading session begins 4:00 a.m. ET and concludes at the commencement of NYSE Arca's regular trading hours at 9:30 a.m. ET, and Nasdaq Stock Market LLC ("Nasdaq") Rule 4701(g) provides that Nasdaq's early trading session begins at 4:00 a.m. and continues until the 9:30 a.m. commencement of Nasdaq's regular trading hours. Additionally, NYSE Arca Rule 7.34–E(a)(1) provides that the exchange begins accepting orders 30 minutes before its early trading session (i.e., 3:30 a.m. ET).

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>9</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>10</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>11</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change to extend the Exchange's Early Trading Session hours will remove impediments to and perfect the mechanism of a free and open market and national market system and will benefit investors by providing market participants with additional opportunities to source and access

liquidity for their orders on the Exchange. All orders entered during the proposed acceptance period and extended Early Trading Session hours will continue to be handled in the same manner as they are today. In addition to this, the proposed rule change will not affect the protection of investors as it is consistent with early trading session hours, as well as the System acceptance time, already in place under the rules of other equities exchanges, as previously filed with the Commission. Finally, the Exchange notes that updating the references to Early Trading Session operation times in Rule 11.1 and 14.1 will also remove impediments to and perfect the mechanism of a free and open market and national market system and benefit investors because the updates ensure that the Exchange Rules properly reflect the proposed changes to the Early Trading Session hours.

### *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. Particularly, the Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because all Members will be able to enter orders earlier in the day for System acceptance and for execution in the lengthened Early Trading Session. As stated, the proposed rule change does not alter the manner in which a User's orders are handled. The Exchange also does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, and may promote competition, because the proposed trading hours are identical to those of early trading sessions currently in place on other equities exchanges.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

## **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section

19(b)(3)(A)(iii) of the Act<sup>12</sup> and Rule 19b–4(f)(6) thereunder.<sup>13</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b–4(f)(6) thereunder.<sup>15</sup>

A proposed rule change filed under Rule 19b–4(f)(6)<sup>16</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),<sup>17</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Exchange asserts that the proposed rule change does not introduce any new or novel issues. Rather, the Exchange states that it is proposing extend its Early Trading Session hours to the same as those on other equities exchanges. The Exchange represents that this proposal would not alter the manner in which Users' orders will be handled for acceptance or execution in the Early Trading Session. The Exchange further states that waiving the operative delay will allow it to implement these extended hours as soon as practicable, with a target implementation date of December 7, 2020. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>18</sup>

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 17 CFR 240.19b–4(f)(6).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>16</sup> 17 CFR 240.19b–4(f)(6).

<sup>17</sup> 17 CFR 240.19b–4(f)(6)(iii).

<sup>18</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> *Id.*



At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2020-056 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-2020-056. 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 offices of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2020-056, and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-26406 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270-148, OMB Control No. 3235-0133]**

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

#### *Extension:*

Rule 17a-19 and Form X-17A-19

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Rule 17a-19 (17 CFR 240.17a-19) and Form X-17A-19 of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17a-19 requires every national securities exchange and registered national securities association to file a Form X-17A-19 with the Commission and the Securities Investor Protection Corporation ("SIPC") within 5 business days of the initiation, suspension, or termination of any member and, when terminating the membership interest of any member, to notify that member of its obligation to file financial reports as required by Exchange Act Rule 17a-5(b).<sup>1</sup> There are currently a total of 10 national securities exchanges and registered national securities associations that are potential respondents under the rule.

<sup>19</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 17 CFR 240.17a-5(b).

Commission staff anticipates that the national securities exchanges and registered national securities associations collectively will make 408 total filings annually pursuant to Rule 17a-19 and that each filing will take approximately 15 minutes. The total reporting burden is estimated to be approximately 102 total annual hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: [www.reginfo.gov](http://www.reginfo.gov). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain) and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: November 25, 2020.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-26494 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-90522; File No. SR-BOX-2020-37]**

### Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Provisions of the Exchange's Second Amended and Restated Limited Liability Company Agreement

November 25, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on November 24, 2020, BOX Exchange LLC ("Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.



solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend the provisions of its Second Amended and Restated Limited Liability Company Agreement. 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 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**

##### **Changes to the Exchange LLC Agreement**

The Exchange is a Delaware limited liability company that, therefore, is governed by its charter in the form of a limited liability company agreement. Pursuant to the Exchange LLC Agreement, MXUS2 was designated as the party to interact with certain governmental taxing authorities on behalf of the Exchange. MXUS2 has notified the Exchange that it will no longer serve in this capacity.<sup>3</sup> The Exchange desires to substitute an officer of the Exchange to represent the Exchange when interacting with applicable taxing authorities. Accordingly, the Exchange proposes certain discrete amendments to the Exchange LLC Agreement that would replace MXUS2 with an officer of the Exchange for purposes of tax matters. In addition, the Exchange proposes to replace the defined term "Tax Matters Representative" with "Tax Matters Representative" in order to accurately identify the new tax matters

representative. These amendments to the Exchange LLC Agreement are proposed to become effective by the adoption of a written amendment in the form attached as Exhibit 5A.

The proposed amendment to the Exchange LLC Agreement would insert a new defined term "Tax Matters Representative" into Section 1.1 of the Exchange LLC Agreement to replace the now obsolete term "Tax Matters Member" to ease the reader's access to the new term used in the document.

The proposed amendment to the Exchange LLC Agreement would delete the following language contained in Section 11.6 of the Exchange LLC Agreement, which currently designates MXUS2 as the tax matters member:

"11.6 Tax Matters Member. MXUS2 shall be the tax matters Member of the Exchange for purposes of the Code, and shall be entitled to take such actions on behalf of the Exchange in any and all proceedings with the Internal Revenue Service as it, in its absolute discretion, deems appropriate without regard to whether such actions result in a settlement of tax matters favorable to some Members and adverse to other Members. Notwithstanding the foregoing, MXUS2 shall (a) promptly deliver to the other Members copies of any notices, letters or other documents received by MXUS2 as the tax matters Member of the Exchange, (b) keep the other Members informed with respect to all matters involving MXUS2 as the tax matters Member of the Exchange, and (c) consult with the other Members and obtain the approval of the other Members prior to taking any actions as the tax matters Member of the Exchange. The tax matters Member shall not be entitled to be paid by the Exchange any fee for services rendered in connection with any tax proceeding, but shall be reimbursed by the Exchange for all third-party costs and expenses incurred by it in connection with any such proceeding and shall be indemnified by the Exchange with respect to any action brought against it in connection with the settlement of any such proceeding by applying, mutatis mutandis, the provisions of Article 13."

The proposed amendment to the Exchange LLC Agreement would replace the deleted text above with the following, which designates an officer of the Exchange as its tax matters representative:

"11.6 Tax Matters Representative. The president of the Exchange, or another officer of the Exchange designated by its chief executive officer, shall be the tax matters representative of the Exchange (the "Tax Matters Representative") for purposes of the

Code, and shall be entitled to take such actions on behalf of the Exchange in any and all proceedings with the Internal Revenue Service and any corresponding provision of state or local income tax law as such officer deems appropriate without regard to whether such actions result in a settlement of tax matters favorable to some Members and adverse to other Members. Notwithstanding the foregoing, the Exchange shall (a) promptly deliver to the Members copies of any notices, letters or other documents received by it as the Tax Matters Representative, (b) keep the Members informed with respect to all matters involving the Tax Matters Representative, and (c) consult with the Members and obtain the approval of the Members prior to taking any actions as the Tax Matters Representative. The Tax Matters Representative shall be reimbursed by the Exchange for all costs and expenses incurred by the Tax Matters Representative in connection with such role and shall be indemnified by the Exchange with respect to any action brought against the Tax Matters Representative in connection with the settlement of any proceeding by applying, mutatis mutandis, the provisions of Article 13."

The Exchange notes, the proposal makes two substantive changes to the Exchange LLC Agreement. First, the proposed provision would provide that the president of the Exchange, or another officer of the Exchange (if designated by its chief executive officer), will be the tax matters representative of the Exchange in order to take action on behalf of the Exchange and represent the Exchange in all matters with the Internal Revenue Service or any other state or local tax officials. Second, the tax matters representative may be entitled to be paid by the Exchange a fee for services rendered in connection with representing the Exchange in any tax proceeding because officers of the Exchange are compensated for their services.

##### **Changes to the Holdings LLC Agreement**

BOX Holdings is a Delaware limited liability company that, therefore, is governed by its charter in the form of a limited liability company agreement. Pursuant to the Holdings LLC Agreement, MXUS2 was designated as the party to interact with certain governmental taxing authorities on behalf of BOX Holdings. MXUS2 has notified BOX Holdings that it will no

<sup>3</sup> No other changes to the status of MXUS2 as a Member of the Exchange is being proposed at this time.

longer serve in this capacity.<sup>4</sup> BOX Holdings desires to substitute an officer of BOX Holdings to represent BOX Holdings when interacting with applicable taxing authorities. Accordingly, the Exchange proposes certain discrete amendments to the Holdings LLC Agreement that would replace MXUS2 with an officer of BOX Holdings for purposes of tax matters. In addition, the Exchange proposes to replace the defined term “Tax Matters Member” with “Tax Matters Representative” in order to accurately identify the new tax matters representative. These amendments are proposed to become effective by the adoption of a written amendment to the Holdings LLC Agreement in the form attached as Exhibit 5B.

The proposed amendment to the Holdings LLC Agreement would replace the term “Tax Matters Member” with a new term, “Tax Matters Representative” everywhere it appears in the Holdings LLC Agreement, which is two instances in Section 1.1 and one instance in Section 11.5. The first change in Section 1.1 is where the term appears as part of the defined term, “Depreciation;” the second is the current definitional cross reference for the term “Tax Matters Member” in Section 1.1 and the third is where the term appears in the discussion of tax elections in Section 11.5. The purpose of these changes is to adopt a new defined term and use it consistently throughout the document.

The proposed amendment to the Holdings LLC Agreement would delete the following language contained in Section 11.6 of the Holdings LLC Agreement, which currently designates MXUS2 as the tax matters member:

“11.6 Tax Matters Member. MXUS2 shall be the tax matters partner of BOX Holdings for purposes of the Code, and shall be entitled to take such actions on behalf of BOX Holdings in any and all proceedings with the Internal Revenue Service and any corresponding provision of state or local income tax law (the “Tax Matters Member”). Notwithstanding the foregoing, the Tax Matters Member shall (a) promptly deliver to the other Members copies of any notices, letters or other documents received by it as the Tax Matters Member, and (b) keep the other Members informed with respect to all matters involving it as the Tax Matters Member of BOX Holdings. Each Member shall have the right to participate in any tax audits, controversies and litigations involving BOX Holdings (“Tax Claims”)

at its own expense. The Tax Matters Member shall not settle any material Tax Claim without the prior written consent of all Members that may be adversely affected by such settlement, which consent shall not be unreasonably conditioned, delayed or withheld. The Tax Matters Member shall not be entitled to be paid by BOX Holdings any fee for services rendered in connection with any tax proceeding, but shall be reimbursed by BOX Holdings for all third-party costs and expenses incurred by it in connection with any such proceeding and shall be indemnified by BOX Holdings with respect to any action brought against it in connection with the settlement of any such proceeding by applying, *mutatis mutandis*, the provisions of Article 13. If needed to have Subchapter C of Chapter 63 of the Code apply to BOX Holdings, the Tax Matters Member shall make an election on behalf of BOX Holdings pursuant to Code Section 6231(a)(1)(B)(ii).”

The proposed amendment to the Holdings LLC Agreement would replace the deleted text above with the following, which designates an officer of BOX Holdings as its tax matters representative:

“11.6 Tax Matters Representative. The president of BOX Holdings, or another officer of BOX Holdings designated by its senior executive officer, shall be the tax matters representative of BOX Holdings (the “Tax Matters Representative”) for purposes of the Code, and shall be entitled to take such actions on behalf of BOX Holdings in any and all proceedings with the Internal Revenue Service and any corresponding provision of state or local income tax law. Notwithstanding the foregoing, the Tax Matters Representative shall (a) promptly deliver to the Members copies of any notices, letters or other documents received by it as the Tax Matters Representative, and (b) keep the Members informed with respect to all matters involving it as the Tax Matters Representative. Each Member shall have the right to participate in any tax audits, controversies and litigations involving BOX Holdings (“Tax Claims”) at its own expense. The Tax Matters Representative shall not settle any material Tax Claim without the prior written consent of all Members that may be adversely affected by such settlement, which consent shall not be unreasonably conditioned, delayed or withheld. The Tax Matters Representative shall be reimbursed by BOX Holdings for all costs and expenses incurred by the Tax Matters Representative in connection with such

role and shall be indemnified by the Exchange with respect to any action brought against the Tax Matters Representative in connection with the settlement of any proceeding by applying, *mutatis mutandis*, the provisions of Article 13. If needed to have Subchapter C of Chapter 63 of the Code apply to BOX Holdings, the Tax Matters Representative shall make an election on behalf of BOX Holdings pursuant to Code Section 6231(a)(1)(B)(ii).”

The Exchange notes, the proposal makes two substantive changes to the Holdings LLC Agreement. First, the Exchange notes the amended provision would provide that the president of BOX Holdings, or another officer of BOX Holdings (if designated by its senior executive officer), will be the tax matters representative of BOX Holdings in order to take action on behalf of BOX Holdings and represent BOX Holdings in all matters with the Internal Revenue Service or any other state or local tax officials. Second, the tax matters representative may be entitled to be paid by BOX Holdings a fee for services rendered in connection with representing BOX Holdings in any tax proceeding because officers of BOX Holdings are compensated for their services.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(1)<sup>5</sup> of the Act, in that it would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The proposed rule change would contribute to the orderly operation of the Exchange and would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange participants and persons associated with its exchange participants, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange because it would allow the Exchange to designate an officer to deal with tax matters on its behalf. The Exchange believes that revising the defined terms used throughout the Exchange LLC Agreement and the Holdings LLC

<sup>4</sup> No other changes to the status of MXUS2 as a Member of BOX Holdings is being proposed at this time.

<sup>5</sup> 15 U.S.C. 78f(b)(1).

Agreement and making the terms internally consistent with the other proposed changes would promote readability and comprehension of the documents, making the language clear and concise.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes that the proposed rule change will impose no burden on competition because it is ministerial in nature and will not have any competitive impact. As described above, the Exchange is proposing certain discrete amendments to the Exchange LLC Agreement and the Holdings LLC Agreement that would (i) provide a replacement tax matters representative to replace MXUS2, which is withdrawing from service in this role, and (ii) consistently revise the defined terms in the Exchange LLC Agreement and the Holdings LLC Agreement to make them internally consistent. For these reasons, the Exchange believes that the proposed changes are consistent with the Exchange Act as there is no impact on competition.

#### *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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>6</sup> and Rule 19b-4(f)(6) thereunder.<sup>7</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.<sup>8</sup>

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)<sup>9</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-BOX-2020-37 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-2020-37. 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-2020-37 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-26500 Filed 11-30-20; 8:45 am]

BILLING CODE 8011-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-90505; File No. SR-ICC-2020-011]

### **Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to the ICC Clearing Rules**

November 24, 2020.

#### **I. Introduction**

On September 30, 2020, ICE Clear Credit LLC ("ICC") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4,<sup>2</sup> a proposed rule change to revise ICC's Clearing Rules (the "Rules")<sup>3</sup> to incorporate credit default swaptions ("Index Swaptions") into its summary assessment approach.<sup>4</sup> The proposed rule change was published for comment in the **Federal Register** on October 16, 2020.<sup>5</sup> The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Capitalized terms used but not defined herein have the meanings specified in the Rules.

<sup>4</sup> See Notice *infra* note 5, 85 FR at 65891.

<sup>5</sup> Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice Relating to the ICC Clearing Rules, Exchange Act Release No. 90138 (October 8, 2020); 85 FR 65891 (October 16, 2020) (SR-ICC-2020-011) ("Notice").

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(iii). Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange satisfied this requirement.

<sup>9</sup> 15 U.S.C. 78s(b)(2)(B).

## II. Description of the Proposed Rule Change

In connection with ICC's proposed launch of the clearing of Index Swaptions, ICC is proposing to revise the Rules to incorporate Index Swaptions into its summary assessment approach, described in Rule 702(e) and Schedule 702 of the Rules.<sup>6</sup> ICC has previously filed with the Commission changes to certain other policies and procedures related to the clearing of Index Swaptions (the "Swaption Rule Filings") in order to adopt or amend certain related policies and procedures in preparation for the launch of clearing of Index Swaptions.<sup>7</sup> The Swaption Rule Filings describe an Index Swaption as when one party (the "Swaption Buyer") has the right (but not the obligation) to cause the other party (the "Swaption Seller") to enter into an index credit default swap transaction at a pre-determined strike price on a specified expiration date on specified terms. In the case of Index Swaptions that would be cleared by ICC, the underlying index credit default swap would be limited to certain CDX and iTraxx Europe index credit default swaps that are accepted for clearing by ICC, and which would be automatically cleared by ICC upon exercise of the Index Swaption by the Swaption Buyer in accordance with its terms. As also described in the Swaption Rule Filings, ICC would not commence clearing of Index Swaptions until all such policies and procedures have been approved by the Commission or otherwise become effective. As such, ICC filed the proposed rule change as part of ICC's larger effort to adopt the necessary policies and procedures prior to the eventual launch of the clearing of Index Options.<sup>8</sup>

As part of ICC's end-of-day price discovery process, ICC Clearing Participants ("CPs") are required to submit end-of-day prices for single name and index credit default swap ("CDS") Contracts in accordance with ICC Procedures. The failure of any CP to provide such price submissions constitutes a Missed Submission

pursuant to Rules 404(b), 702(b) and 702(e). As an incentive against Missed Submissions, ICC has adopted a summary assessment approach described in Rule 702(e) and Schedule 702 of the Rules.<sup>9</sup> In connection with ICC's proposed launch of the clearing of Index Swaptions, the proposed amendments would incorporate Index Swaptions in Rule 702(e) and update Schedule 702 of the Rules to include assessment amounts for Index Swaption Missed Submissions, in addition to the current assessment amounts for single name and index CDS Missed Submissions.

Specifically, the proposed changes to Rule 702(e)(i)(2) would specify that CPs holding a cleared interest in one or more Index Swaption Contracts sharing the same underlying index and expiration date are required to provide end-of-day prices for all Index Swaption Contracts sharing the same underlying index and expiration date. The proposed changes to Rule 702(e)(ii)(2) would specify that a CP is eligible for one waiver per calendar year for Index Swaption Missed Submissions caused by technical failures, which conforms to one waiver per calendar year for single name Missed Submissions and one waiver per calendar year for index Missed Submissions, in each case caused by technical failures. The proposed amendment to Rule 702(e)(ii)(4) would make a related change to include Index Swaptions, along with single name and index CDS, as a type of Missed Submission that may satisfy the waiver requirements of Rule 702(e)(ii)(2).

As noted above, ICC would update current Schedule 702 to include assessment amounts for Index Swaption Missed Submissions. Specifically, the proposed revisions to Schedule 702 would establish an assessment amount of \$250 for each Index Swaption Missed Submission and a maximum assessment per day for Missed Submissions on Index Swaption instruments sharing the same underlying index (\$10,000) and for all Index Swaption instruments during one day (\$50,000). ICC's proposed changes to Schedule 702 of the Rules would also correct a typographical error with respect to single names by replacing "Submissions" with "Submission" in the current phrase "For each Missed Submissions."

## III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory

organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.<sup>10</sup> For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act, Section 17A(b)(3)(G) of the Act, Section 17A(b)(3)(H) of the Act,<sup>11</sup> and Rule 17Ad-22(e)(6)(iv) thereunder.<sup>12</sup>

### A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.<sup>13</sup>

As noted above, the proposed rule change would amend ICC's summary assessment approach described in Rule 702(e) and Schedule 702 of the Rules with respect to Missed Submissions to incorporate Index Swaptions. The proposed rule change would also amend current Rule 702(e) to provide one waiver per calendar year to CPs for Index Swaption Missed Submissions caused by technical failures. The Commission believes that by amending its summary assessment approach to include Index Swaptions, ICC would enhance its ability to maintain the accuracy, integrity and effectiveness of ICC's price discovery process by incentivizing CPs to avoid Index Swaption Missed Submissions for non-technical reasons.

The Commission further believes that the proposed amendments to ICC's summary assessment approach should improve ICC's end-of-day pricing process because they should provide ICC a means of ensuring that its CPs submit complete prices for Index Swaptions. Consequently, the Commission believes that the proposed changes should promote the prompt and accurate clearance and settlement of transactions by ICC. The Commission further believes that these improvements, in turn, should enhance ICC's ability to manage the risks associated with clearing Index Swaptions, including the calculation

<sup>6</sup> The description herein is substantially excerpted from the Notice.

<sup>7</sup> SEC Release No. 34-87297 (Oct. 15, 2019), 84 FR 56270 (Oct. 21, 2019) (SR-ICC-2019-007); SEC Release No. 34-89142 (June 24, 2020), 85 FR 39226 (June 30, 2020) (SR-ICC-2020-002); SEC Release No. 34-89436 (July 31, 2020), 85 FR 47827 (Aug. 6, 2020) (SR-ICC-2020-008); SEC Release No. 34-89948 (Sep. 22, 2020), 85 FR 60845 (Sep. 28, 2020) (SR-ICC-2020-010).

<sup>8</sup> ICC has represented to the Commission that this proposed rule change is the last rule filing under Section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)) needed to change ICC's Rules to account for the clearing of Index Swaptions.

<sup>9</sup> See Notice, 85 FR at 65891.

<sup>10</sup> 15 U.S.C. 78s(b)(2)(C).

<sup>11</sup> 15 U.S.C. 78q-1(b)(3)(F), 15 U.S.C. 78q-1(b)(3)(G), and 15 U.S.C. 78q-1(b)(3)(H).

<sup>12</sup> 17 CFR 240.17Ad-22(e)(6)(iv).

<sup>13</sup> 15 U.S.C. 78q-1(b)(3)(F).

and collection of margin requirements that will account for Index Swaptions as part of its overall risk-based margin system and risk management processes which rely, in part, on the end-of-day prices submitted by ICC's CPs.<sup>14</sup> Moreover, the Commission believes these risks, if mismanaged, could threaten ICC's ability to operate and therefore its ability to clear and settle transactions and safeguard funds. As a result, the Commission believes that the proposed changes should promote ICC's ability to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.

Therefore, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.<sup>15</sup>

#### *B. Consistency With Section 17A(b)(3)(G) of the Act*

Section 17A(b)(3)(G) of the Act requires, among other things, that ICC's rules provide that CPs shall be appropriately disciplined for violation of any provision of ICC's rules by fine or other fitting sanction.<sup>16</sup> As noted above, the proposed rule change would amend current Rule 702(e) and Schedule 702 of the Rules to impose an assessment amount on any CP that violates the ICC Procedures for submitting end-of-day prices with respect to Index Swaption Contracts. The Commission believes that this aspect of the proposed rule change should be an appropriate form of discipline for CPs that violate such price submission procedures for any reason other than technical failures that meet the waiver requirements of Rule 702(e)(ii)(2). The Commission also believes that without an appropriate sanction that would deter CPs from committing Index Swaption Missed Submission Violations, the accuracy, integrity and reliability of ICC's end-of-day price discovery process could be impaired. Therefore, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(G) of the Act.<sup>17</sup>

<sup>14</sup> See SEC Release No. 34-82960 (Mar. 28, 2018), 83 FR 14300, 14302 (Apr. 3, 2018) (SR-ICC-2018-002) (finding improvements to ICC's end-of-day pricing process would improve "ICC's risk management processes related to the end-of-day pricing process, including the calculation and collection of certain margin requirements" and would "promote the prompt and accurate clearance and settlement of the products cleared by ICC, and . . . enhance ICC's ability to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible").

<sup>15</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>16</sup> 15 U.S.C. 78q-1(b)(3)(G).

<sup>17</sup> 15 U.S.C. 78q-1(b)(3)(G).

#### *C. Consistency With Section 17A(b)(3)(H) of the Act*

Section 17A(b)(3)(H) of the Act<sup>18</sup> requires, among other things, that ICC's rules, in general, provide a fair procedure with respect to the disciplining of participants. As noted above, the proposed rule change would provide a generally applicable process for requesting and reviewing waivers of the summary assessment amount for Index Swaption Missed Submissions. This proposed process is consistent with the processes currently set forth in Rule 702(e) for requesting and reviewing waivers for single name Missed Submissions and index Missed Submissions, which is another indication of procedural fairness and consistency with respect to disciplining CPs for Missed Submissions across all three types of CDS Contracts after ICC's proposed launch of clearing Index Swaptions. For these reasons, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(H) of the Act.<sup>19</sup>

#### *D. Consistency With Rule 17Ad-22(e)(6)(iv) Under the Act*

Rule 17Ad-22(e)(6)(iv)<sup>20</sup> requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, uses reliable sources of timely price data and uses procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable. The Commission believes the proposed rule change is reasonably designed to deter the occurrence of Index Swaption Missed Submissions that would undermine ICC's ability to maintain the integrity and effectiveness of its end-of-day price discovery process for the provision of reliable prices, which could, in turn, be used to enhance ICC's ability to establish and maintain risk-based margin requirements which rely, in part, on the end-of-day prices provided by CPs. The Commission believes that the proposed rule change is therefore consistent with Rule 17Ad-22(e)(6)(iv).<sup>21</sup>

<sup>18</sup> 15 U.S.C. 78q-1(b)(3)(H).

<sup>19</sup> 15 U.S.C. 78q-1(b)(3)(H). In addition, the Commission believes that ICC's proposed correction of a typographical error in Schedule 702 of the Rules with respect to single names will enhance the clarity and procedural fairness of ICC's assessment approach with respect to each single name Missed Submission.

<sup>20</sup> 17 CFR 240.17Ad-22(e)(6)(iv).

<sup>21</sup> 17 CFR 240.17Ad-22(e)(6)(iv).

#### **IV. Conclusion**

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act, Section 17A(b)(3)(G) of the Act, Section 17A(b)(3)(H) of the Act<sup>22</sup> and Rule 17Ad-22(e)(6)(iv) thereunder.<sup>23</sup>

It is therefore ordered pursuant to Section 19(b)(2) of the Act<sup>24</sup> that the proposed rule change (SR-ICC-2020-011), be, and hereby is, approved.<sup>25</sup>

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26404 Filed 11-30-20; 8:45 am]

BILLING CODE 8011-01-P

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-90503; File No. SR-MRX-2020-18]

#### **Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7 for Orders Entered Into the Exchange's Price Improvement Mechanism**

November 24, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 13, 2020, Nasdaq MRX, LLC ("MRX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend its Pricing Schedule at Options 7 in connection with the pricing for orders

<sup>22</sup> 15 U.S.C. 78q-1(b)(3)(F), 15 U.S.C. 78q-1(b)(3)(G) and 15 U.S.C. 78q-1(b)(3)(H).

<sup>23</sup> 17 CFR 240.17Ad-22(e)(6)(iv).

<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</sup> In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>26</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

entered into the Exchange's Price Improvement Mechanism ("PIM").<sup>3</sup>

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7 in connection with the pricing for orders entered into the Exchange's PIM.

Today for both regular and complex PIM orders, the Exchange pays a PIM break-up rebate to an originating Priority Customer<sup>4</sup> PIM order that executes with a response (order or quote), other than the PIM contra-side order, of \$0.40 per contract in Penny Symbols and \$1.00 per contract in Non-Penny Symbols.<sup>5</sup> The Exchange also offers a higher PIM break-up rebate in note 3 of Options 7, Section 3.A for Members that meet certain cumulative volume requirements. In particular, Members that execute an average daily volume ("ADV") of 10,000 PIM originating contracts or greater within a month are currently eligible to receive a

rebate of (i) \$0.45 per contract in Penny Symbols (in lieu of \$0.40 per contract) for complex PIM orders only, and (ii) \$1.05 per contract in Non-Penny Symbols (in lieu of \$1.00 per contract) for both regular and complex PIM orders.

The Exchange now proposes a number of changes to the break-up rebate structure. First, the Exchange proposes to lower the base rebates to \$0.25 in Penny Symbols and \$0.60 per contract in Non-Penny Symbols. Second, the Exchange proposes to replace the existing note 3 incentive described above with a new program. As amended, note 3 of Options 7, Section 3.A would provide:

Break-up Rebates are provided for an originating Priority Customer PIM Order that executes with any response (order or quote) other than the PIM contra-side order. Members that are not in an Affiliated Member or Affiliated Entity relationship and that execute 0.05% or greater of Customer Total Consolidated Volume in non-PIM Priority Customer contracts within a month will receive an additional rebate of: (i) \$0.20 per contract in Penny Symbols for Complex PIM Orders only, (ii) \$0.15 per contract in Penny Symbols for Regular PIM Orders only, and (iii) \$0.45 per contract in Non-Penny Symbols for both Regular and Complex PIM Orders. Alternatively, Affiliated Members or Affiliated Entities will be eligible to receive the rebates in this note 3 without any additional volume requirements. The Exchange will provide the rebate to the OFP arm of an Affiliated Member relationship, or the Appointed OFP arm of an Affiliated Entity relationship.

The new program replaces the current cumulative ADV threshold with a total industry percentage threshold, specifically a Customer Total Consolidated Volume<sup>6</sup> percentage threshold. The Exchange notes that the proposed percentage threshold of 0.05% or greater of Customer Total Consolidated Volume is comparable in terms of requisite volume to the existing ADV threshold of 10,000 or greater contracts. The Exchange is proposing to replace the current cumulative volume thresholds with total industry volume percentages to align with increasing Member activity on MRX over time. The Exchange notes that total industry percentage thresholds are established concepts within its Pricing Schedule.<sup>7</sup>

<sup>6</sup> Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month. See Options 7, Section 3, Table 3.

<sup>7</sup> Specifically, the qualifying tier thresholds for the Exchange's maker/taker pricing are based on

The Exchange is also modifying this qualification by requiring that Members execute 0.05% or greater of Customer Total Consolidated Volume in non-PIM Priority Customer contracts (instead of PIM originating contracts, as currently required). The Exchange believes this change will incentivize Members to bring a wider range of order flow for execution on the Exchange, which activity may result in tighter spreads making the Exchange a more attractive trading venue to the benefit of all market participants. As discussed in the following paragraph, this volume qualification only applies to Members that are not in affiliated relationships.

The new program will also offer a new, alternative basis, to qualify for the higher break-up rebates in amended note 3. Specifically, as proposed, Members may enter into certain affiliated relationships (*i.e.*, Affiliated Members<sup>8</sup> or Affiliated Entities<sup>9</sup>) to qualify for the higher break-up rebates. The Exchange recently filed to permit Members to enter into Affiliated Entities in order to aggregate volume and qualify for certain pricing incentives, provided they are not Affiliated Members.<sup>10</sup> Accordingly, the proposed changes are intended to enhance participation in the Exchange's new Affiliated Entity program in order to encourage additional order flow to MRX. As described above, the rebates in note 3 will be provided to the OFP<sup>11</sup> arm of the Affiliated Member relationship, or

Customer Total Consolidated Volume percentages. See Options 7, Section 3, Table 3.

<sup>8</sup> An "Affiliated Member" is a Member that shares at least 75% common ownership with a particular Member as reflected on the Member's Form BD, Schedule A. See Options 7, Section 1(c).

<sup>9</sup> An "Affiliated Entity" is a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Pricing Schedule. Market Makers and OFPs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will terminate after a one (1) year period, unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Entity relationships must be renewed annually by each party sending an email to the Exchange. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time. See Options 7, Section 1(c).

<sup>10</sup> See SR-MRX-2020-21(not yet published).

<sup>11</sup> An "OFP" is any Member, other than a Market Maker, that submits orders, as agent or principal, to the Exchange. See Options 7, Section 1(c)

<sup>3</sup> PIM is a process by which an Electronic Access Member ("EAM") can provide price improvement opportunities for a transaction wherein the EAM seeks to facilitate an order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against an order it represents as agent. See Options 3, Section 13.

<sup>4</sup> A "Priority Customer" is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq MRX Options 1, Section 1(a)(36).

<sup>5</sup> Break-up rebates apply only to regular PIM orders of 500 or fewer contracts and to complex PIM orders where the largest leg is 500 or fewer contracts. See Options 7, Section 3.A.

the Appointed OFP in the Affiliated Entity relationship, without additional volume requirements. The Exchange believes that this will encourage Members who are not Affiliated Members to enter into Affiliated Entity relationships and submit any amount of Priority Customer PIM order flow in order to receive the note 3 rebates. The Exchange will also make clear in note 3 that the 0.05% or greater Customer Total Consolidated Volume requirement only applies to Members that are not in an Affiliated Member or Affiliated Entity relationship.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>13</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . ." <sup>14</sup>

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission

highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>15</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

In this context, the Exchange believes that its proposal for the PIM break-up rebates is reasonable. While the Exchange is proposing to lower the base break-up rebates to \$0.25 in Penny Symbols and \$0.60 per contract in Non-Penny Symbols, the Exchange believes that market participants will continue to be incentivized to send Priority Customer order flow to PIM to receive the base break-up rebate. Furthermore, the Exchange notes the proposed break-up rebates remain in line with similar rebates provided at other exchanges.<sup>16</sup>

In addition, the Exchange believes that the amended note 3 incentive providing higher break-up rebates to qualifying Members, as described above, is reasonable in several respects. Regarding the change in the volume qualification to replace the current cumulative ADV threshold with a total industry percentage threshold, the Exchange notes that this is to align with increasing Member activity on MRX over time. The Exchange is proposing to base the volume qualification on a percentage of industry volume in recognition of the fact that the volume executed by a Member may rise or fall

with industry volume. A percentage of industry volume calculation allows the note 3 qualification to be calibrated to current market volumes rather than requiring a static amount of volume regardless of market conditions. While the amount of volume required by the proposed qualification in note 3 may change in any given month due to increases or decreases in industry volume, the Exchange believes that the proposed threshold requirement is set at an appropriate level. As discussed above, the proposed threshold of 0.05% Customer Total Consolidated Volume is comparable to the existing ADV threshold of 10,000 contracts, so the Exchange anticipates minimal impact to Members as a result of replacing the current cumulative volume threshold with the new total industry percentage threshold. Furthermore, as noted above, total industry percentage thresholds are established concepts within its Pricing Schedule.<sup>17</sup>

The Exchange also believes that modifying this qualification in note 3 to require Members that are not in an Affiliated Member or Affiliated Entity relationship to execute 0.05% or greater of Customer Total Consolidated Volume in non-PIM Priority Customer contracts (instead of PIM originating contracts, as currently required) is reasonable because this change will incentivize Members to bring a wider range of order flow for execution on the Exchange. This could ultimately result in increased trading opportunities, tighter spreads and greater price discovery, making the Exchange a more attractive trading venue to the benefit of all market participants.

Furthermore, the Exchange believes that the new, alternative basis, to qualify for the higher break-up rebates in amended note 3 is reasonable. In particular, the Exchange will permit Affiliated Members or Affiliated Entities to send any amount of Priority Customer PIM volume for purposes of qualifying for higher break-up rebates. The Exchange believes that this will attract additional Priority Customer PIM order flow to the Exchange and will fortify participation in the Exchange's Affiliated Entity program, as noted above. Permitting Members to enter into an Affiliated Entity relationship for purposes of qualifying the OFP arm of an Affiliated Member relationship, or the Appointed OFP of an Affiliated Entity relationship, for the higher break-up rebates in amended note 3 may also

<sup>15</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

<sup>16</sup> See MIAX Options ("MIAX") Fee Schedule, Sections 1(a)(v) and (vi), which set forth MIAX Price Improvement Mechanism ("PRIME") and MIAX Complex PRIME ("cPRIME") pricing. MIAX PRIME and cPRIME Break-up Credits are \$0.25 per contract (Penny Classes) and \$0.60 per contract (Non-Penny Classes). See also Cboe Exchange, Inc. ("Cboe") Fee Schedule, Break-Up Credits, which provides Break-Up Credits of \$0.25 per contract (Penny Classes) and \$0.60 per contract (Non-Penny Classes) to orders executed in Cboe's Automated Improvement Mechanism.

<sup>17</sup> Specifically, the qualifying tier thresholds for the Exchange's maker/taker pricing are based on Customer Total Consolidated Volume percentages. See Options 7, Section 3, Table 3.

<sup>12</sup> 15 U.S.C. 78 f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>14</sup> *NetCoalition v. SEC*, 615 F.3d 525, 539 (DC Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR-NYSEArca–2006–21)).



encourage the counterparties that comprise the Affiliated Members or Affiliated Entities to incentivize each other to attract and seek to execute more Priority Customer volume in PIM. In turn, market participants would benefit from the increased liquidity with which to interact and potentially tighter spreads on orders. Overall, incentivizing market participants with increased opportunities to earn higher break-up rebates may increase the quality of the liquidity available on MRX.

The Exchange believes that the PIM break-up rebate changes, as proposed, are equitable and not unfairly discriminatory because the proposed rebates will apply equally to all Priority Customer PIM originating orders that execute against PIM responses. The Exchange's proposal to permit Affiliated Members or Affiliated Entities to send any amount of Priority Customer PIM volume for purposes of qualifying the OFP arm or the Appointed OFP for the higher break-up rebates in note 3 is equitable and not unfairly discriminatory because all Members who are not Affiliated Members may elect to become an Affiliated Entity. While Priority Customer PIM orders will continue to receive the break-up rebate, as opposed to other market participant orders, the Exchange believes that this application of the rebate is equitable and not unfairly discriminatory because Priority Customer order flow enhances liquidity on the Exchange. This, in turn, provides more trading opportunities and attracts other market participants, thus facilitating tighter spreads, increased order flow and trading opportunities to the benefit of all market participants. Moreover, the Exchange has historically provided lower pricing or other incentives to Priority Customers in order to attract such order flow to MRX.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of Exchange market participant at a competitive disadvantage. The proposed changes to the Exchange's PIM break-up rebate program are designed to incentivize market participants to direct PIM order flow to the Exchange. While PIM break-up rebates apply directly to Priority Customer orders, the Exchange believes that the proposed changes benefit all market participants by fortifying and encouraging additional

liquidity and order flow to MRX. Furthermore, the Exchange believes that encouraging additional activity by Affiliated Members and Affiliated Entities in the manner discussed above likewise benefits all market participants as it contributes to the Exchange's depth of book as well as to the top of book liquidity. To the extent that the proposal attracts more liquidity, this increased order flow would continue to make the Exchange a more competitive venue for order execution and all of the Exchange's market participants should benefit from the improved market quality. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange would benefit all market participants and improve competition on the Exchange.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and rebate changes. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>18</sup> and Rule 19b-4(f)(2)<sup>19</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MRX-2020-18 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number *SR-MRX-2020-18*. 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

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>19</sup> 17 CFR 240.19b-4(f)(2).



Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR-MRX-2020-18* and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

[FR Doc. 2020-26402 Filed 11-30-20; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90507; File No. SR-MIAX-2020-36]

### Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Delay Implementation of an Amendment to Rule 518, Complex Orders, To Permit Legging Through the Simple Market

November 24, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 20, 2020, Miami International Securities Exchange, LLC (“MIAX Options” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to delay implementation of the change to

allow a component of a complex order<sup>3</sup> that legs into the Simple Order Book<sup>4</sup> to execute at a price that is outside the NBBO.<sup>5</sup>

The text of the proposed rule change is available on the Exchange’s website at <http://www.miaxoptions.com/rule-filings/> at MIAX Options’ principal office, 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

On October 22, 2019, the Exchange filed a proposed rule change to amend subsection (c)(2)(iii) of Exchange Rule 518, Complex Orders, to remove the provision which provides that a component of a complex order that legs into the Simple Order Book may not execute at a price that is outside the NBBO.<sup>6</sup> The proposed rule change indicated that the Exchange would announce the implementation date of the proposed rule change by Regulatory

<sup>3</sup> A “complex order” is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the “legs” or “components” of the complex order), for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. Mini-options may only be part of a complex order that includes other mini-options. Only those complex orders in the classes designated by the Exchange and communicated to Members via Regulatory Circular with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis and communicated to Members via Regulatory Circular, are eligible for processing. See Exchange Rule 518(a)(5).

<sup>4</sup> The “Simple Order Book” is the Exchange’s regular electronic book of orders and quotes. See Exchange Rule 518(a)(15).

<sup>5</sup> The term “NBBO” means the national best bid or offer as calculated by the Exchange based on market information received by the Exchange from the appropriate Securities Information Processor (“SIP”). See Exchange Rule 518(a)(14).

<sup>6</sup> See Securities Exchange Release No. 87440 (November 1, 2019), 84 FR 60117 (November 7, 2019) (SR-MIAX-2019-45).

Circular to be published no later than 90 days following the operative date of the proposed rule. The implementation date will be no later than 90 days following the issuance of the Regulatory Circular. The Exchange delayed the implementation of this functionality until the fourth quarter of 2020.<sup>7</sup> The Exchange now proposes to delay the implementation of this functionality until the second quarter of 2021.

The Exchange proposes this delay in order to allow the Exchange to re-prioritize its software delivery and release schedule as a result of a shift in priorities resulting from the impact the coronavirus pandemic has had on Exchange operations. The Exchange will issue a Regulatory Circular notifying market participants at least 45 days prior to implementing this functionality.

###### 2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>9</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest by allowing the Exchange additional time to implement the proposed functionality.

##### B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange’s proposal to delay the implementation of the proposed functionality does not impose an undue burden on competition. Delaying the implementation will simply allow the Exchange additional time to properly plan and implement the proposed functionality.

<sup>7</sup> See Securities Exchange Release No. 88691 (April 20, 2020), 85 FR 23092 (April 24, 2020) (SR-MIAX-2020-07).

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6)<sup>11</sup> thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MIAX-2020-36 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-MIAX-2020-36. 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-MIAX-2020-36 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-26405 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-90523; File No. SR-BOX-2020-36]**

**Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend BOX Rule 7020 ("Days and Hours of Business")**

November 25, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on November 19, 2020, BOX Exchange LLC ("Exchange") filed with the Securities

and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend BOX Rule 7020 ("Days and Hours of Business"). 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 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 proposes to amend BOX Rule 7020 (Days and Hours of Business) to include Rule 7020(f) which details Exchange actions in emergency conditions. Specifically, proposed Rule 7020(f) states that the Chief Executive Officer or the President (or his or her senior-level designee) have the power to halt trading in some or all securities traded on the Exchange, to close some or all Exchange facilities, to determine the duration of any such halt or closing, to take one or more of the actions permitted to be taken by any person or body of the Exchange under Exchange rules, or to take any other action deemed to be necessary or appropriate for the maintenance of a fair and orderly market or the protection of investors, or otherwise in the public interest, due to emergency conditions or extraordinary circumstances, such as (1) actual or threatened physical danger, severe climatic conditions, natural disaster, civil unrest, terrorism, acts of war, or

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

loss or interruption of facilities utilized by the Exchange, or (2) a request by a governmental agency or official, or (3) a period of mourning or recognition for a person or event. The Exchange notes that the proposed change is substantially similar to a rule currently in place at another options exchange.<sup>3</sup>

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>4</sup> in general, and Section 6(b)(5) of the Act,<sup>5</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 because they are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes that the proposed rule changes are consistent with Section 6(b)(1) of the Act,<sup>6</sup> in that they enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Exchange Participants and persons associated with its Exchange Participants, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

The Exchange believes that the proposed changes to BOX Rule 7020 would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest, and enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act, because they would make BOX Rule 7020 more reflective of the process and procedure with respect to the exchange actions in emergency conditions which are practiced at all other exchanges in the industry.<sup>7</sup> Further, the Exchange believes that bestowing authority in the Chief Executive Officer of the President (or his or her senior-level designee)—rather

than the BOX Board—is appropriate as their authority relates to the general charge and supervision of Exchange business. The Exchange believes that the responsibility and power to take action in emergency conditions bestowed upon the CEO or President is appropriate as it is more aligned with the scope of the CEO’s and President’s roles at the Exchange than the Board.

Lastly, the Exchange again notes that a substantially similar rule currently exists at another exchange.<sup>8</sup>

## B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the proposed rule is substantially similar to a rule currently in place at another exchange. The Exchange does not believe that the proposed rule change imposes any burden on intramarket competition because it applies to all Participants and is not designed to address any competitive issue. Further, the Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the rule change is not intended to address competitive issues but rather is concerned solely with the administration and functioning of the Exchange.

## 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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>9</sup> and Rule 19b–4(f)(6) thereunder.<sup>10</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if

consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b–4(f)(6)(iii) thereunder.<sup>12</sup>

A proposed rule change filed under Rule 19b–4(f)(6)<sup>13</sup> normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii),<sup>14</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange’s proposed rule is substantively similar to rules currently in place on other options exchanges and therefore raises no novel regulatory issues. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change as operative upon filing with the Commission.<sup>15</sup>

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)<sup>16</sup> 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:

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii). Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange satisfied this requirement.

<sup>13</sup> 17 CFR 240.19b–4(f)(6).

<sup>14</sup> 17 CFR 240.19b–4(f)(6)(iii).

<sup>15</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>3</sup> See Cboe Exchange, Inc. (“Cboe”) Rule 5.23(d)

<sup>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

<sup>6</sup> 15 U.S.C. 78f(b)(1).

<sup>7</sup> See Cboe Rule 5.23(d), NYSE Arca, Inc. (“NYSE Arca”) Rule 7.1–O(d), and Miami International Securities Exchange LLC (“MIAX”) Rule 523.

<sup>8</sup> See *supra* note 3.

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>10</sup> 17 CFR 240.19b–4(f)(6).

*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](mailto:rule-comments@sec.gov). Please include File Number SR-BOX-2020-36 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-2020-36. 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-2020-36 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26501 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-90519; File No. SR-NASDAQ-2020-072]

**Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Certain Annual Listing Fees**

November 25, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 13, 2020, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes a rule change to modify certain listing fees. While changes proposed herein are effective upon filing, the Exchange has designated the proposed amendments to be operative on January 1, 2021.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

The purpose of the proposed rule change is to modify the Exchange's all-inclusive annual listing fees for all domestic and foreign companies listing equity securities covered by Listing Rules 5910 and 5920 on the Nasdaq Global Select, Global and Capital Markets.

Currently, for companies listed on the Capital Market, other than, in part, ADRs, Closed-end Funds and Limited Partnerships, the all-inclusive annual fee ranges from \$43,000 to \$77,000; for ADRs listed on the Capital Market the all-inclusive annual fee ranges from \$43,000 to \$51,500; and for Limited Partnerships listed on the Capital Market the all-inclusive annual fee ranges from \$31,000 to \$38,500. On the Global and Global Select Markets, the all-inclusive annual fee for companies other than, in part, ADRs, Closed-end Funds and Limited Partnerships ranges from \$46,000 to \$159,000; for ADRs the all-inclusive annual fee ranges from \$46,000 to \$82,000; and for Limited Partnerships the all-inclusive annual fee ranges from \$38,500 to \$79,500. The all-inclusive annual fee for Closed-end Funds listed on any market tier ranges from \$31,000 to \$102,500. In each case, a company's all-inclusive annual fee is based on its total shares outstanding.<sup>3</sup>

Nasdaq proposes to amend the all-inclusive annual fee for all domestic and foreign companies listing equity securities on the Nasdaq Global Select, Global and Capital Markets to the following amounts,<sup>4</sup> effective January 1, 2021:

<sup>3</sup> REITs are subject to the same fee schedule as other equity securities; however for the purpose of determining the total shares outstanding, shares outstanding of all members in a REIT Family listed on the same Nasdaq market tier may be aggregated. Similarly, for the purpose of determining the total shares outstanding, fund sponsors may aggregate shares outstanding of all Closed-End Funds in the same fund family listed on the Nasdaq Global Market or the Nasdaq Capital Market. See Listing Rules 5910(b)(2) and 5920(b)(2).

<sup>4</sup> The proposed fee change reflects about a 2.5% increase rounded to the nearest \$500.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>17</sup> 17 CFR 200.30-3(a)(12).

## GLOBAL/GLOBAL SELECT MARKETS

| Total shares outstanding                                                                | Annual fee<br>before the<br>proposed change | Annual fee<br>effective<br>January 1, 2021 |
|-----------------------------------------------------------------------------------------|---------------------------------------------|--------------------------------------------|
| Equity securities other than, in part, ADRs, Closed-end Funds and Limited Partnerships: |                                             |                                            |
| Up to 10 million shares .....                                                           | \$46,000                                    | \$47,000                                   |
| 10+ to 50 million shares .....                                                          | 56,500                                      | 58,000                                     |
| 50+ to 75 million shares .....                                                          | 77,000                                      | 79,000                                     |
| 75+ to 100 million shares .....                                                         | 102,500                                     | 105,000                                    |
| 100+ to 125 million shares .....                                                        | 128,000                                     | 131,000                                    |
| 125+ to 150 million shares .....                                                        | 138,500                                     | 142,000                                    |
| Over 150 million shares .....                                                           | 159,000                                     | 163,000                                    |
| ADRs:                                                                                   |                                             |                                            |
| Up to 10 million ADRs and other listed equity securities .....                          | 46,000                                      | 47,000                                     |
| 10+ to 50 million ADRs and other listed equity securities .....                         | 51,500                                      | 53,000                                     |
| 50+ to 75 million ADRs and other listed equity securities .....                         | 61,500                                      | 63,000                                     |
| Over 75 million ADRs and other listed equity securities .....                           | 82,000                                      | 84,000                                     |
| Closed-end Funds:                                                                       |                                             |                                            |
| Up to 50 million shares .....                                                           | 31,000                                      | 32,000                                     |
| 50+ to 100 million shares .....                                                         | 51,500                                      | 53,000                                     |
| 100+ to 250 million shares .....                                                        | 77,000                                      | 79,000                                     |
| Over 250 million shares .....                                                           | 102,500                                     | 105,000                                    |
| Limited Partnerships:                                                                   |                                             |                                            |
| Up to 75 million shares .....                                                           | 38,500                                      | 39,500                                     |
| 75+ to 100 million shares .....                                                         | 51,500                                      | 53,000                                     |
| 100+ to 125 million shares .....                                                        | 64,000                                      | 65,500                                     |
| 125+ to 150 million shares .....                                                        | 69,000                                      | 70,500                                     |
| Over 150 million shares .....                                                           | 79,500                                      | 81,500                                     |

## CAPITAL MARKET

| Total shares outstanding                                                                | Annual fee<br>before the<br>proposed change | Annual fee<br>effective<br>January 1, 2021 |
|-----------------------------------------------------------------------------------------|---------------------------------------------|--------------------------------------------|
| Equity securities other than, in part, ADRs, Closed-end Funds and Limited Partnerships: |                                             |                                            |
| Up to 10 million shares .....                                                           | \$43,000                                    | \$44,000                                   |
| 10+ to 50 million shares .....                                                          | 56,500                                      | 58,000                                     |
| Over 50 million shares .....                                                            | 77,000                                      | 79,000                                     |
| ADRs:                                                                                   |                                             |                                            |
| Up to 10 million ADRs and other listed equity securities .....                          | 43,000                                      | 44,000                                     |
| Over 10 million ADRs and other listed equity securities .....                           | 51,500                                      | 53,000                                     |
| Closed-end Funds:                                                                       |                                             |                                            |
| Up to 50 million shares .....                                                           | 31,000                                      | 32,000                                     |
| 50+ to 100 million shares .....                                                         | 51,500                                      | 53,000                                     |
| 100+ to 250 million shares .....                                                        | 77,000                                      | 79,000                                     |
| Over 250 million shares .....                                                           | 102,500                                     | 105,000                                    |
| Limited Partnerships:                                                                   |                                             |                                            |
| Up to 75 million shares .....                                                           | 31,000                                      | 32,000                                     |
| Over 75 million shares .....                                                            | 38,500                                      | 39,500                                     |

Nasdaq also proposes to update the maximum fee applicable to a Closed-End Fund family and the maximum fee applicable to a REIT Family to reflect the proposed fee change for other equity securities, as described above.<sup>5</sup>

As described below, Nasdaq proposes to make the aforementioned fee increases to better reflect the Exchange's costs related to listing equity securities and the corresponding value of such listing to issuers.

Nasdaq also proposes to remove references to fees that are no longer applicable because they were

superseded by new fee rates specified in the rule text.

While these changes are effective upon filing, Nasdaq has designated the proposed amendments to be operative on January 1, 2021.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other

persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq believes that it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to amend Listing Rules 5910(b)(2) and 5920(b)(2) to increase the various listing fees<sup>8</sup> as set forth above because of the

<sup>5</sup>In 2014, Nasdaq adopted an all-inclusive annual listing fee schedule to simplify, clarify and enhance transparency around the annual fee to which listed companies are subject. See Securities Exchange Act Release No. 73647 (November 19, 2014), 79 FR 70232 (November 25, 2014) (SR-NASDAQ-2014-87). Effective January 1, 2017, Nasdaq reduced the fees for limited partnerships listed on Nasdaq. See

Continued

<sup>5</sup> See footnote 3 above.

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).

increased costs incurred by Nasdaq since it established the current rates. In that regard, the Exchange notes that its general costs to support our listed companies have increased, including due to price inflation. The Exchange also continues to expand and improve the services it provides to listed companies as well as the technology and the virtual experience available with the Nasdaq MarketSite. Nasdaq has also invested in a community-building program for listed companies through the creation of the Nasdaq Network, which brings together industry leaders in both public and private spheres, to help Nasdaq's clients and partners more effectively connect with other industry leaders and c-suite individuals for partnership opportunities.

Nasdaq also believes that it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to amend Listing Rules 5910(b)(2) and 5920(b)(2) to increase the various listing fees while rounding the increase to the nearest \$500 as set forth above because such rounding represents de minimis variation in fees for Nasdaq listed companies. In addition, Nasdaq has used the same methodology since the adoption of the all-inclusive annual listing fee schedule and all annual listing fees under Listing Rules 5910(b)(2) and 5920(b)(2) are rounded to \$500.

The proposed change to update the maximum fee applicable to a Closed-End Fund family and the maximum fee applicable to a REIT Family to reflect the proposed fee change for other equity securities, as described above, is not unfairly discriminatory because it merely reflects the change in fees for other equity securities without changing the substance of the rule.

Finally, Nasdaq notes that it operates in a highly competitive market in which market participants can readily switch exchanges if they deem the listing fees

excessive.<sup>9</sup> In such an environment, Nasdaq must continually review its fees to assure that they remain competitive.

The proposed removal of text relating to fees that are no longer applicable is ministerial in nature and has no substantive effect.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as amended. The market for listing services is extremely competitive and listed companies may freely choose alternative venues, both within the U.S. and internationally. For this reason, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>10</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>9</sup> The Justice Department has noted the intense competitive environment for exchange listings. See "NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/271214.htm](http://www.justice.gov/atr/public/press_releases/2011/271214.htm).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

#### *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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2020-072 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2020-072. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2020-072 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26499 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

Securities Exchange Act Release No. 79770 (January 10, 2017), 82 FR 4947 (January 17, 2017) (SR-NASDAQ-2016-173). Effective January 1, 2019, Nasdaq modified the fee schedule for ADRs listed on Nasdaq, including to subject ADRs to the same minimum fee as other companies listing equity securities on the same tier of Nasdaq and to bring the ADRs fees closer to the fees paid by other domestic and foreign companies listing equity securities on Nasdaq. See Securities Exchange Act Release No. 84880 (December 20, 2018), 83 FR 67374 (December 28, 2018) (SR-NASDAQ-2018-103). Effective January 1, 2020, Nasdaq modified the fee schedule for all domestic and foreign companies listing equity securities covered by Listing Rules 5910 and 5920 on the Nasdaq Global Select, Global and Capital Markets. Securities Exchange Act Release No. 87538 (November 14, 2019), 84 FR 64168 (November 20, 2019) (SR-NASDAQ-2019-087).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–420, OMB Control No. 3235–0479]

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

*Extension:*  
Rule 15c2–7

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the previously approved collection of information provided for in Rule 15c2–7 (17 CFR 240.15c2–7) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 15c2–7 places disclosure requirements on broker-dealers who have correspondent relationships, or agreements identified in the rule, with other broker-dealers. Whenever any such broker-dealer enters a quotation for a security through an inter-dealer quotation system, Rule 15c2–7 requires the broker-dealer to disclose these relationships and agreements in the manner required by the rule. The inter-dealer quotation system must also be able to make these disclosures public in association with the quotation the broker-dealer is making.

When Rule 15c2–7 was adopted in 1964, the information it requires was necessary for execution of the Commission’s mandate under the Securities Exchange Act of 1934 to prevent fraudulent, manipulative and deceptive acts by broker-dealers. In the absence of the information collection required under Rule 15c2–7, investors and broker-dealers would have been unable to accurately determine the market depth of, and demand for, securities in an inter-dealer quotation system.

There are approximately 3,647 broker-dealers registered with the Commission. Any of these broker-dealers could be potential respondents for Rule 15c2–7, so the Commission is using that number as the number of respondents. Rule 15c2–7 applies only to quotations entered into an inter-dealer quotation system, such as the OTC Bulletin Board (“OTCBB”) or OTC Link, operated by OTC Markets Group Inc. (“OTC Link”) or the electronic trading platform

operated by Global OTC. According to representatives of OTC Link, Global OTC and the OTCBB, none of these entities has recently received, or anticipates receiving any Rule 15c2–7 notices. However, because such notices could be made, the Commission estimates that one filing is made annually pursuant to Rule 15c2–7.

Based on prior industry reports, the Commission estimates that the average time required to enter a disclosure pursuant to the rule is .75 minutes, or 45 seconds. The Commission sees no reason to change this estimate. We estimate that impacted respondents spend a total of .0125 hours per year to comply with the requirements of Rule 15c2–7 (1 notice (×) 45 seconds/notice).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: [www.reginfo.gov](http://www.reginfo.gov). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to (i) [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain) and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549, or by sending an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: November 25, 2020.

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

[FR Doc. 2020–26505 Filed 11–30–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90512; File No. SR–BOX–2020–14]

### Self-Regulatory Organizations; BOX Exchange LLC; Notice of Designation of Longer Period for Commission Action on 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 LLC

November 24, 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 (“Exchange Act”) <sup>1</sup> and Rule 19b–4 thereunder, <sup>2</sup> 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. <sup>3</sup> On July 16, 2020, pursuant to Section 19(b)(2) of the Exchange Act, <sup>4</sup> the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. <sup>5</sup>

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. <sup>6</sup> On August 12, 2020, the Commission published the proposed rule change, as modified by Amendment No. 1, for notice and comment and instituted proceedings to determine whether to approve or disapprove the

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 88946 (May 26, 2020), 85 FR 33454 (June 1, 2020) (SR–BOX–2020–14) (“Original Notice”). Comments received on the proposed rule change are available at: <https://www.sec.gov/comments/sr-box-2020-14/srbox202014.htm>. In Amendment No. 1 to the proposed rule change, *infra* note 6, the Exchange stated that the proposed rule change was previously filed with the Commission as the proposed rule change SR–BOX–2019–19, which the Exchange amended twice, and that the current proposed rule change, SR–BOX–2020–14, is “substantively identical” to the previously-filed proposed rule change, SR–BOX–2019–19, as modified by Amendment No. 2. SR–BOX–2019–19, as modified by Amendment No. 2, was published for comment in the **Federal Register** on March 6, 2020. 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). The Exchange withdrew proposed rule change SR–BOX–2019–19 on May 12, 2020. See Securities Exchange Act Release No. 89018 (June 4, 2020), 85 FR 35458 (June 10, 2020) (Notice of Withdrawal of a Proposed Rule Change).

As applicable, the Commission will consider comments submitted on SR–BOX–2019–19 and SR–BOX–2020–14 in its review of SR–BOX–2020–14. Comments on SR–BOX–2019–19 can be found at: <https://www.sec.gov/comments/sr-box-2019-19/srbox201919.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 89328 (July 16, 2020), 85 FR 44338 (July 22, 2020).

<sup>6</sup> Amendment No. 1 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-box-2020-14/srbox202014-7570237-222233.pdf>.

proposed rule change, as modified by Amendment No. 1.<sup>7</sup>

Section 19(b)(2) of the Act<sup>8</sup> provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on June 1, 2020.<sup>9</sup> November 28, 2020 is 180 days from that date, and January 27, 2021 is 240 days from that date. The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> designated January 27, 2021 as the date by which the Commission shall either approve or disapprove the proposed rule change, as modified by Amendment No. 1 (File No. SR-BOX-2020-14).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26411 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90501; File No. SR-ISE-2020-39]

### Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to an Amendment to Options 7, Section 4, Related to Complex Orders Fees and Rebates, and Options 7, Section 9

November 24, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 13, 2020, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 7, Section 4, “Complex Order Fees and Rebates,” and Options 7, Section 9, “Legal & Regulatory.”

The Exchange originally filed the proposed pricing change on November 2, 2020 (SR-ISE-2020-37). On November 12, 2020, the Exchange withdrew that filing and is submitting this replacement filing on November 13, 2020.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal

office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend Options 7, Section 4, “Complex Order Fees and Rebates,” and Options 7, Section 9, “Legal & Regulatory.” Each change will be described below.

###### Options 7, Section 4

###### Priority Customer Rebates for Complex Orders

The Exchange’s proposal to amend Options 7, Section 4, “Complex Order Fees and Rebates” is intended to offer Members an ability to earn higher Priority Customer Complex Order rebates. Specifically, the Exchange proposes to amend Priority Customer Complex Order Tiers 8 and 9 and add a new Tier 10. Today, the Exchange pays rebates to Priority Customers pursuant to the below tier schedule.

#### PRIORITY CUSTOMER REBATES

| Priority customer complex tier <sup>(7)</sup> <sup>(13)</sup> <sup>(16)</sup> | Total affiliated member or affiliated entity complex order volume (excluding crossing orders and responses to crossing orders) calculated as a percentage of customer total consolidated volume | Rebate for select symbols <sup>(1)</sup> | Rebate for non-select symbols <sup>(1)</sup> <sup>(4)</sup> |
|-------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|-------------------------------------------------------------|
| Tier 1 .....                                                                  | 0.000%–0.200% .....                                                                                                                                                                             | (\$0.25)                                 | (\$0.40)                                                    |
| Tier 2 .....                                                                  | Above 0.200%–0.400% .....                                                                                                                                                                       | (0.30)                                   | (0.55)                                                      |
| Tier 3 .....                                                                  | Above 0.400%–0.450% .....                                                                                                                                                                       | (0.35)                                   | (0.70)                                                      |
| Tier 4 .....                                                                  | Above 0.450%–0.750% .....                                                                                                                                                                       | (0.40)                                   | (0.75)                                                      |
| Tier 5 .....                                                                  | Above 0.750%–1.000% .....                                                                                                                                                                       | (0.45)                                   | (0.80)                                                      |
| Tier 6 .....                                                                  | Above 1.000%–1.350% .....                                                                                                                                                                       | (0.47)                                   | (0.80)                                                      |
| Tier 7 .....                                                                  | Above 1.350%–2.000% .....                                                                                                                                                                       | (0.48)                                   | (0.80)                                                      |
| Tier 8 .....                                                                  | Above 2.000%–2.600% .....                                                                                                                                                                       | (0.50)                                   | (0.85)                                                      |
| Tier 9 .....                                                                  | Above 2.600% .....                                                                                                                                                                              | (0.52)                                   | (0.85)                                                      |

<sup>7</sup> See Securities Exchange Act Release No. 89536 (August 12, 2020), 85 FR 51250 (August 19, 2020).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See Original Notice, *supra* note 3.

<sup>10</sup> *Id.*

<sup>11</sup> 17 CFR 200.30-3(a)(57).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.



First, the Exchange proposes to amend the criteria to qualify for Tiers 8 and 9 and certain rebates as discussed below.

Today, Tier 8 of the Complex Order Priority Customer Rebates requires Members to submit above 2.000%–2.60% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume in order to receive a \$0.50 per contract rebate for Select Symbols<sup>3</sup> and an \$0.85 per contract rebate for Non-Select Symbols.<sup>4</sup> The Exchange proposes to amend the qualifications of Tier 8 to require Members to submit above 2.000%–2.750% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume to receive an increased \$0.52 per contract rebate for Select Symbols and continue to receive an \$0.85 per contract rebate for Non-Select Symbols. The Exchange is both amending the qualifications for Tier 8 and increasing the rebate for Select Symbols with this proposal. A Member who qualified for Tier 8 in a prior month, with above 2.000% to 2.60% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume (“Current Tier 8 Volume”), would continue to qualify for Tier 8 rebates with this proposal if that same amount of volume was submitted. The Member would qualify for an increased Tier 8 Rebate for Select Symbols of \$0.52 per contract when submitting Current Tier 8 Volume

and the same \$0.85 per contract Tier 8 Rebate for Non-Select Symbols.

Today, Tier 9 of the Complex Order Priority Customer Rebates requires Members to submit above 2.600% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume in order to receive a \$0.52 per contract rebate for Select Symbols and an \$0.85 per contract rebate for Non-Select Symbols. The Exchange proposes to amend the qualifications of Tier 9 to require Members to submit above 2.750%–4.500% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume to continue to receive a \$0.52 per contract rebate for Select Symbols and an increased \$0.86 per contract rebate for Non-Select Symbols. The Exchange is both amending the qualifications for Tier 9 and increasing the rebate for Non-Select Symbols with this proposal. A Member who qualified for Tier 9 in a prior month, with above 2.600% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume (“Current Tier 9 Volume”), may continue to qualify for Tier 9 rebates with this proposal if the Member submitted greater than 2.750% volume Calculated as a Percentage of Customer Total Consolidated Volume. A Member who submitted the same amount of volume as in the prior month would receive either: (1) An increased Tier 8 Rebate for Select Symbols of \$0.52 per contract and the same \$0.85

per contract Rebate for Non-Select Symbols; or (2) the same Tier 9 Rebate for Select Symbols of \$0.52 per contract and an increased \$0.86 per contract Rebate for Non-Select Symbols, depending on the Member’s volume Calculated as a Percentage of Customer Total Volume. Also, with this proposal, a Member would have the opportunity to qualify for increased Tier 10 rebates of \$0.53 per contract for Select Symbols and \$0.88 per contract for Non-Select Symbols by submitting above 4.500% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume.

Second, the Exchange proposes to add a new Priority Customer Complex Order Tier 10 which requires Members to submit above 4.500% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume to receive a \$0.53 per contract rebate for Select Symbols and an \$0.88 per contract rebate for Non-Select Symbols. This new Tier 10 would offer Members an opportunity to earn higher Priority Customer Complex Order rebates on ISE.

The Exchange believes that amending Priority Customer Complex Order Rebate Tiers 8 and 9 and adding a new Tier 10 will attract a greater amount of Priority Customer Complex Order volume to ISE.

#### Maker and Taker Fees for Complex Orders

Today, the Exchange assesses certain Maker and Taker Fees for Complex Orders transacted on ISE as follows:

#### MAKER AND TAKER FEES

| Market participant                   | Maker fee for select symbols | Maker fee for non-select symbols | Maker fee for select symbols when trading against priority customer | Maker fee for non-select symbols when trading against priority customer | Taker fee for select symbols | Taker fee for non-select symbols |
|--------------------------------------|------------------------------|----------------------------------|---------------------------------------------------------------------|-------------------------------------------------------------------------|------------------------------|----------------------------------|
| Market Maker .....                   | \$0.10                       | \$0.20                           | (3) \$0.47                                                          | \$0.86                                                                  | (3) \$0.50                   | (8) \$0.86                       |
| Non-Nasdaq ISE Market Maker (FarMM)  | 0.20                         | 0.20                             | 0.48                                                                | 0.88                                                                    | 0.50                         | (8) 0.88                         |
| Firm Proprietary/Broker-Dealer ..... | 0.10                         | 0.20                             | 0.48                                                                | 0.88                                                                    | 0.50                         | (8) 0.88                         |
| Professional Customer .....          | 0.10                         | 0.20                             | 0.48                                                                | 0.88                                                                    | 0.50                         | (8) 0.88                         |
| Priority Customer .....              | 0.00                         | 0.00                             | 0.00                                                                | 0.00                                                                    | 0.00                         | 0.00                             |

<sup>3</sup> “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the

Penny Interval Program. See Options 7, Section 1(b).

<sup>4</sup> “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. See Options 7, Section 1(b).

Current note 3 of Options 7, Section 4, which applies to orders for Market Makers who qualify for the Complex Order Maker Fee for Select Symbols when trading against Priority Customer Complex Orders and the Complex Order Taker Fee for Select Symbols, states, “This fee is \$0.47 per contract for Market Makers that achieve Priority Customer Complex Tier 8 and \$0.44 per contract for Market Makers that achieve Priority Customer Complex Tier 9.” Current note 8 of Options 7, Section 4 which applies to Complex Orders of Market Makers, Non-Nasdaq ISE Market Makers (FarMM), Firm Proprietary/Broker-Dealers, and Professional Customers who qualify for the Complex Order Taker Fee for Non-Select Symbols, states, “A \$0.05 per contract surcharge will be assessed to non-Priority Customer Complex Orders that take liquidity from the Complex Order Book, excluding Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism and “exposure” auctions pursuant to Options 3, Section 14(c)(3).”

The Exchange proposes to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers from \$0.47 to \$0.50 per contract. The Exchange also proposes to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Non-Nasdaq ISE Market Makers (FarMM), Firm Proprietary/Broker-Dealers, and Professional Customers from \$0.48 to \$0.50 per contract. Priority Customers would continue to pay no Complex Order Maker Fees for Select Symbols when trading against Priority Customer.

In addition, the Exchange proposes to amend note 3 which is applicable to the aforementioned Complex Order Maker and Taker Fees by instead providing, “This fee is \$0.49 per contract for Market Makers that achieve Priority Customer Complex Tier 8, \$0.47 per contract for Market Makers that achieve Priority Customer Complex Tier 9, and \$0.44 per contract for Market Makers that achieve Priority Customer Complex Tier 10.”

While the Exchange is increasing the Complex Order Maker Fees for Select Symbols when trading against Priority Customers, Market Makers, Non-Nasdaq ISE Market Makers (FarMM), Firm Proprietary/Broker-Dealers, and Professional Customers who qualify for Priority Customer Complex Order Tiers 8 and 9 or new Tier 10, would continue to receive lower Complex Order Maker Fees, which is intended to incentive these Members to transact a greater

amount of Priority Customer Complex Orders on ISE.

#### Technical Amendments

The Exchange proposes to remove reserved note 17 within Options 7, Section 4 because this note is not necessary. The Exchange also proposes to remove obsolete date references and an obsolete rate within Options 7, Section 9.C. related to the Options Regulatory Fee. The dates refer to past dates.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>7</sup>

Likewise, in *NetCoalition v. Securities and Exchange Commission*<sup>8</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>9</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>10</sup>

Further, “[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’. . . .”<sup>11</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

#### Options 7, Section 4

##### Priority Customer Rebates for Complex Orders

The Exchange’s proposal to amend the qualifications of Tier 8, to require Members to submit above 2.000%–2.750% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume in order to receive an increase \$0.52 per contract rebate for Select Symbols and continue to receive an \$0.85 per contract rebate for Non-Select Symbols, and its proposal to amend the qualifications of Tier 9, to require Members to submit above 2.750%–4.500% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume to continue to receive a \$0.52 per contract rebate for Select Symbols and an increased \$0.86 per contract rebate for Non-Select Symbols, are reasonable. The Exchange believes amending Priority Customer Complex Order Tiers 8 and 9 will attract a greater amount of Priority Customer Complex Order volume to ISE. Specifically, Members who desire to qualify for the increased \$0.52 per contract rebate for Select Symbols in Tier 8 or continue to qualify for an \$0.85 per contract rebate for Non-Select Symbols in Tier 8 or Members who desire to continue to qualify for the \$0.52 per contract rebate in Select Symbols for Tier 9 or an increased \$0.86 per contract rebate for Non-Select Symbols in Tier 9 will be encouraged to submit the requisite order flow to obtain the same or higher rebates. With respect to Priority Customer Complex Order Tier 8, the Exchange notes that the

<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>7</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>8</sup> *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

<sup>9</sup> See *NetCoalition*, at 534–535.

<sup>10</sup> *Id.* at 537.

<sup>11</sup> *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

proposed amendment should not result in lower rebates for any Member submitting the same Complex Order volume as the Member submitted in the prior month. With respect to Priority Customer Complex Order Tier 9, Members who qualified for Tier 8 in a prior month with Current Tier 8 Volume<sup>12</sup> would continue to qualify for Tier 8 rebates with this proposal if that same amount of volume was submitted and would receive an increased Tier 8 Rebate for Select Symbols of \$0.52 per contract and the same \$0.85 per contract Rebate for Non-Select Symbols. In addition, the Member may earn increased Tier 9<sup>13</sup> or Tier 10 rebates if the Member submitted additional qualifying volume. Therefore, the Member would receive the same or higher Tier 8 rebates.

Members who qualified for Tier 9 in a prior month with Current Tier 9 Volume may continue to qualify for Tier 9 rebates with this proposal if the Member submitted greater than 2.750% volume and would receive either: (1) An increased Tier 8 Rebate for Select Symbols of \$0.52 per contract and the same \$0.85 per contract Rebate for Non-Select Symbols; or (2) the same Tier 9 Rebate for Select Symbols of \$0.52 per contract and an increased \$0.86 per contract Rebate for Non-Select Symbols, depending on the Member's volume Calculated as a Percentage of Customer Total Consolidated Volume. Despite the increase required in Complex Order volume for Priority Customer Complex Order Tier 9, the Exchange's proposal offers Members an opportunity to earn the same or higher Tier 9 rebates. Also, with this proposal, a Member would have the opportunity to qualify for increased Tier 10 rebates of \$0.53 per contract for Select Symbols and \$0.88 per contract for Non-Select Symbols by submitting above 4.500% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume. The Priority

Customer Complex Order rebate program is optional and available to all Members that choose to transact Complex Order flow on ISE in order to earn a rebate on their Priority Customer Complex Order volume. To the extent the program, as modified, continues to attract Complex Order volume to the Exchange, the Exchange believes that the proposed changes would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants.

The Exchange's proposal to add a new Priority Customer Complex Order Tier 10, which requires Members to submit above 4.500% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume in order to receive a \$0.53 per contract rebate for Select Symbols and an \$0.88 per contract rebate for Non-Select Symbols is reasonable. The Exchange believes proposed new Tier 10 will attract a greater amount of Priority Customer Complex Order volume to ISE as the Exchange proposes to pay \$0.53 per contract rebate for Select Symbols and \$0.88 per contract rebate for Non-Select Symbols, the highest Priority Customer Complex Order rebates for that order flow.

The Exchange's proposals to amend the tier qualifications for Priority Customer Complex Order Tiers 8 and 9, increase the Select Symbol rebate in Tier 8, increase the Non-Select Symbol rebate in Tier 9, and add a new Priority Customer Complex Order Tier 10 with rebates of \$0.53 per contract for Select Symbols and \$0.88 per contract for Non-Select Symbols are equitable and not unfairly discriminatory. Any ISE Member may qualify for a Priority Customer Complex Order rebate tier, provided the qualifications are met. By encouraging all Members to transact significant amounts of Priority Customer Complex Order flow (*i.e.*, to qualify for the higher tiers) in order to earn a higher rebate on their Priority Customer Complex Orders, the Exchange seeks to provide more trading opportunities for all market participants, thereby promoting price discovery, and improving the overall market quality of the Exchange. ISE would uniformly pay rebates to Members that qualified for Priority Customer Complex Order rebates. The Exchange anticipates all Members that currently qualify for the Tier 8 or 9 Priority Customer Complex Order rebates will receive the same or higher rebates with this proposal. Also, any Member may qualify for the new Tier 10 Priority Customer Complex

Order rebate to earn even higher rebates. To the extent the proposed changes encourage additional Members to strive for the modified tiers and thus attract more Priority Customer Complex Order volume to the Exchange, this increased order flow would improve the overall quality and attractiveness of the Exchange.

#### Maker and Taker Fees for Complex Orders

The Exchange's proposal to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers from \$0.47 to \$0.50 per contract and to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Non-Nasdaq ISE Market Makers (FarMM), Firm Proprietary/Broker-Dealers, and Professional Customers from \$0.48 to \$0.50 per contract is reasonable because while the Exchange is proposing to increase these fees, the Exchange believes that market participants will continue to be incentivized to send Priority Customer order flow to ISE to obtain rebates offered by the Exchange. Additionally, Market Makers would continue to be offered the opportunity to reduce their Complex Order Maker Fees. If a Market Maker qualifies for Priority Customer Complex Order Tiers 8 and 9, the Complex Order Maker Fee would be reduced to \$0.49 and \$0.47 per contract, respectively. In addition, a Market Maker that qualifies for Priority Customer Complex Order Tier 10 would reduce the Complex Order Maker Fees to \$0.44 per contract. Finally, Priority Customers will continue to pay no Maker Fees for Select Symbols when trading against Priority Customer.

The Exchange's proposal to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers from \$0.47 to \$0.50 per contract and to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Non-Nasdaq ISE Market Makers (FarMM), Firm Proprietary/Broker-Dealers, and Professional Customers from \$0.48 to \$0.50 per contract is equitable and not unfairly discriminatory as all Non-Priority Customers would be assessed the same Complex Order Maker Fees for Select Symbols when trading against Priority Customer. Priority Customer orders bring valuable liquidity to the market which liquidity benefits other market participants. Priority Customers are not assessed Complex Order Maker Fees for Select Symbols when trading against Priority Customer.

<sup>12</sup> Today, Tier 8 of the Complex Order Priority Customer Rebates pays rebates to Members who submit above 2.000%–2.60% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume. With this proposal, Members who submit above 2.000%–2.750% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) Calculated as a Percentage of Customer Total Consolidated Volume are entitled to rebates.

<sup>13</sup> The Exchange notes that the propose Tier 8 Rebate for Select Symbols and the Tier 9 Rebate for Select Symbols, which remains unchanged, are both \$0.52 per contract.

The Exchange's proposal to amend note 3 of Options 7, Section 4 with respect to Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers as well as Complex Order Taker Fees for Select Symbols for Market Makers is reasonable because while the Exchange is reducing the fee discount for Members who qualify for Priority Customer Complex Order Tiers 8 and 9,<sup>14</sup> Market Makers will continue to have the opportunity to reduce their costs when they qualify for Priority Customer Complex Order Tiers 8 and 9. The Exchange will continue to offer Market Makers the opportunity to reduce Complex Order Maker Fees for Select Symbols when trading against Priority Customers, as well as Complex Order Taker Fees for Select Symbols. The Exchange's proposal also offers Market Makers a fee discount when trading against Priority Customer Complex Orders if the qualifications for new Tier 10 are met.<sup>15</sup>

The Exchange's proposal to amend note 3 of Options 7, Section 4 with respect to Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers as well as Complex Order Taker Fees for Select Symbols for Market Makers is equitable and not unfairly discriminatory. Market Makers would continue to be permitted to lower their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, provided the Market Maker qualified for Priority Customer Complex Order Tiers 8, 9 or 10. Today, Market Makers are able to lower their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, provided they qualify for Priority Customer Complex Order Tiers 8 or 9. With this proposal Market Makers would also be able to lower their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, if they qualify for new Priority Customer Complex Order Tier 10. Unlike other market participants, Market Makers

have an obligation to maintain quotes<sup>16</sup> and provide liquidity in the regular market. The Exchange is providing Market Makers the opportunity to reduce their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, provided the Market Maker qualified for Priority Customer Complex Order Tiers 8, 9 or 10, to incentivize these market participants to continue to provide liquidity on ISE.

#### Technical Amendments

The Exchange's proposal to remove reserved note 17 within Options 7, Section 4 is reasonable, equitable and not unfairly discriminatory as this note is not necessary and the amendment is non-substantive. The Exchange's proposal to remove obsolete date references and an obsolete rate within Options 7, Section 9.C. related to the Options Regulatory Fee is reasonable, equitable and not unfairly discriminatory as the dates have passed and the rate is obsolete.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

#### Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

#### Intra-Market Competition

The proposed amendments do not impose an undue burden on intra-market competition.

#### Options 7, Section 4

##### Priority Customer Rebates for Complex Orders

The Exchange's proposals to amend the tier qualifications for Priority Customer Complex Order Tiers 8 and 9, increase the Select Symbol rebate in Tier 8, increase the Non-Select Symbol rebate in Tier 9, and add a new Priority Customer Complex Order Tier 10 with rebates of \$0.53 per contract for Select Symbols and \$0.88 per contract for Non-Select Symbols does not impose an undue burden on competition. Any ISE Member may qualify for a Priority Customer Complex Order rebate tier, provided the qualifications are met. By encouraging all Members to transact significant amounts of Priority Customer Complex Order flow (*i.e.*, to qualify for the higher tiers) in order to earn a higher rebate on their Priority Customer Complex Orders, the Exchange seeks to provide more trading opportunities for all market participants, thereby promoting price discovery, and improving the overall market quality of the Exchange. ISE would uniformly pay rebates to Members that qualified for Priority Customer Complex Order rebates. The Exchange anticipates all Members that currently qualify for the Tier 8 Priority Customer Complex Order rebates will receive the same or higher Tier 8 rebates with this proposal. Members that currently qualify for Tier 9 Priority Customer Complex Order rebates may need to submit additional Priority Customer Complex Order flow to continue to qualify for the same or higher Tier 9 rebates. Also, any Member may qualify for the new Tier 10 Priority Customer Complex Order rebate to earn even higher rebates. To the extent the proposed changes encourage additional Members to strive for the modified tiers and thus attract more Priority Customer Complex Order volume to the Exchange, this increased order flow would improve the overall quality and attractiveness of the Exchange.

##### Maker and Taker Fees for Complex Orders

The Exchange's proposal to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers from \$0.47 to \$0.50 per contract and to increase the Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Non-Nasdaq ISE Market Makers (FarMM), Firm

<sup>14</sup> Today, the Exchange offers Market Makers the opportunity to reduce the Complex Order Maker Fee for Select Symbols when trading against Priority Customer and the Complex Order Taker Fee for Select Symbols to \$0.47 per contract for Tier 8 and \$0.44 per contract for Tier 9. With this proposal, the fee discount within note 3 would decrease. The Exchange would offer Market Makers that qualify for Priority Customer Complex Order Tier 8 a rate of \$0.49 per contract, and the Exchange would offer Market Makers that qualify for Priority Customer Complex Order Tier 9 a rate of \$0.47 per contract.

<sup>15</sup> The Exchange would offer Market Makers that qualify for Priority Customer Complex Order Tier 10 a rate of \$0.44 per contract.

<sup>16</sup> See ISE, Options 2, Section 5.

Proprietary/Broker-Dealers, and Professional Customers from \$0.48 to \$0.50 per contract does not impose an undue burden on competition as all Non-Priority Customers would be assessed the same Complex Order Maker Fees for Select Symbols when trading against Priority Customer. Priority Customer orders bring valuable liquidity to the market which liquidity benefits other market participants. Priority Customers are not assessed Complex Order Maker Fees for Select Symbols when trading against Priority Customer.

The Exchange's proposal to amend note 3 of Options 7, Section 4 with respect to Complex Order Maker Fees for Select Symbols when trading against Priority Customer for Market Makers as well as Complex Order Taker Fees for Select Symbols for Market Makers does not impose an undue burden on competition. Market Makers would continue to be permitted to lower their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, provided the Market Maker qualified for Priority Customer Complex Order Tiers 8, 9 or 10. Today, Market Makers are able to lower their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, provided they qualify for Priority Customer Complex Order Tiers 8 or 9. With this proposal Market Makers would also be able to lower their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, if they qualify for new Priority Customer Complex Order Tier 10. Unlike other market participants, Market Makers have an obligation to maintain quotes<sup>17</sup> and provide liquidity in the regular market. The Exchange is providing Market Makers the opportunity to reduce their Maker Fees for Select Symbols when trading against Priority Customers, as well as Taker Fees for Select Symbols, provided the Market Maker qualified for Priority Customer Complex Order Tiers 8, 9 or 10, to incentivize these market participants to continue to provide liquidity on ISE.

#### Technical Amendments

The Exchange's proposal to remove reserved note 17 within Options 7, Section 4 does not impose an undue burden on competition as this note is not necessary and the amendment is non-substantive. The Exchange's proposal to remove obsolete date references and an obsolete rate within Options 7, Section 9.C. related to the

Options Regulatory Fee does not impose an undue burden on competition.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>18</sup> and Rule 19b-4(f)(2)<sup>19</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2020-39 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2020-39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2020-39 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26400 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-625, OMB Control No. 3235-0686]

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

*Extension:*  
Form TCR

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit an extension for this current collection of information to the Office of Management and Budget for approval.

The Commission invites comment on updates to Form TCR, which is a hard copy form adopted by the Commission

<sup>17</sup> See ISE, Options 2, Section 5.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>19</sup> 17 CFR 240.19b-4(f)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

in 2011.<sup>1</sup> Form TCR may be submitted by whistleblowers who wish to provide information to the Commission and its staff regarding potential violations of the federal securities laws. The Commission estimates that it takes a whistleblower, on average, one and one half hours to complete Form TCR. Based on the receipt of an average of approximately 560 annual Form TCR submissions for the past three fiscal years, the Commission estimates that the annual reporting burden of Form TCR is 840 hours.

Written comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication. Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F St. NE, Washington, DC 20549; or send an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: November 25, 2020.

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26497 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90513; File No. SR-BOX-2020-16]

### Self-Regulatory Organizations; BOX Exchange LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change, as Modified by Amendment No. 1, a Proposed Rule Change in Connection With the Proposed Establishment of the Boston Security Token Exchange LLC as a Facility of the Exchange

November 24, 2020.

On May 12, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change in connection with the proposed commencement of operations of the Boston Security Token Exchange LLC ("BSTX") as a facility of the Exchange. The proposed rule change was published for comment in the **Federal Register** on June 1, 2020.<sup>3</sup> On July 16, 2020, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> 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.<sup>5</sup> On August 3, 2020, the Exchange filed Amendment No. 1 to the proposed rule change ("Amendment No. 1").<sup>6</sup> On August 12, 2020, the Commission published the proposed rule change, as modified by Amendment No. 1, for notice and comment and instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.<sup>7</sup> The Commission has received no comments letters on the proposed rule change, as modified by Amendment No. 1.<sup>8</sup>

Section 19(b)(2) of the Act<sup>9</sup> provides that, after initiating disapproval

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 88949 (May 26, 2020), 85 FR 33258 (June 1, 2020) ("Original Notice").

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 89329 (July 16, 2020), 85 FR 44333 (July 22, 2020).

<sup>6</sup> Amendment No. 1 was filed as a partial amendment. The Exchange also submitted a redline that the Exchange states reflects the changes in the partial amendment compared to the original 19b-4 that was filed on May 12, 2020 and published as the Original Notice. This redline is available on the Commission's website at: <https://www.sec.gov/comments/sr-box-2020-16/srbox202016-7525322-222100.pdf>.

<sup>7</sup> See Securities Exchange Act Release No. 89537 (August 12, 2020), 85 FR 50850 (August 18, 2020).

<sup>8</sup> The Commission notes that the proposed rule change, as modified by Amendment No. 1, is substantially similar to previously-filed proposed rule change, SR-BOX-2019-37, which was published for comment in the **Federal Register** on January 3, 2020. See Securities Exchange Act Release No. 87868 (December 30, 2019), 85 FR 345 (January 3, 2020) (SR-BOX-2019-37) (Notice of Filing of Proposed Rule Change). The Exchange withdrew proposed rule change SR-BOX-2019-37 on May 12, 2020. See Securities Exchange Act Release No. 89017 (June 4, 2020), 85 FR 35473 (June 10, 2020) (Notice of Withdrawal of a Proposed Rule Change).

As applicable, the Commission will consider comment submitted on SR-BOX-2019-37 and SR-BOX-2020-16 in its review of SR-BOX-2020-16. Comments on SR-BOX-2019-37 can be found at: <https://www.sec.gov/comments/sr-box-2019-37/srbox201937.htm>.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on June 1, 2020.<sup>10</sup> November 28, 2020 is 180 days from that date, and January 27, 2021 is 240 days from that date. The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> designated January 27, 2021 as the date by which the Commission shall either approve or disapprove the proposed rule change, as modified by Amendment No.1 (File No. SR-BOX-2020-16).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-26412 Filed 11-30-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SMALL BUSINESS ADMINISTRATION

### Data Collection Available for Public Comments

**ACTION:** 60-Day notice and request for comments.

**SUMMARY:** The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires Federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

**DATES:** Submit comments on or before February 1, 2021.

**ADDRESSES:** Send all comments by email to Gregorius Suryadi, Financial and

<sup>10</sup> See Original Notice, *supra* note 3.

<sup>11</sup> *Id.*

<sup>12</sup> 17 CFR 200.30-3(a)(57).

<sup>1</sup> Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-64545; File No. S7-33-10 (adopted May 25, 2011).

Loan Specialist, Office of Financial Assistance, Small Business Administration at [gregorius.suryadi@sba.gov](mailto:gregorius.suryadi@sba.gov).

**FOR FURTHER INFORMATION CONTACT:**

Gregorius Suryadi, Financial and Loan Specialist, (202) 205–6656, [gregorius.suryadi@sba.gov](mailto:gregorius.suryadi@sba.gov), or Curtis B. Rich, Management Analyst, (202) 205–7030, [curtis.rich@sba.gov](mailto:curtis.rich@sba.gov);

**SUPPLEMENTARY INFORMATION:** For SBA financial assistance programs, SBA Form 413 Personal Financial Statement (PFS) collects information regarding the assets and liabilities of certain owners, officers and guarantors of the small business applicant benefiting from such assistance and is used when analyzing the applicant's repayment abilities or creditworthiness. SBA's Surety Bond Guaranty Program uses the Form 413 PFS information during the claim recovery process. The information is also collected from applicants and participants in SBA's 8(a)/BD and Women-Owned Small Business (WOSB) Program certification process to determine whether they meet the economic disadvantage requirements of the program.

SBA currently has four versions of the Form 413 PFS. The Agency plans to consolidate and streamline these into one Form 413 which will be used across the various program offices. SBA plans to expand and clarify the instructions for the Form 413 to ensure the public will be aware of the specific submission process for each program office. Lastly, the Form 413 may undergo significant formatting changes to make it easier to address mandatory Federal government 508 accessibility compliance.

**Solicitation of Public Comments**

SBA is requesting comments on (a) Whether the collection of information is necessary for the Agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

**Summary of Information Collection**

(1) *Title:* Personal Financial Statement.

*Description of Respondents:* 7(a) and 504 loan Program applicants, Surety Bond Program recovery claimants, Disaster Loan Program applicants excluding sole proprietors and individuals, 8(a)/BD and WOSB Program applicants.

*Form Number:* SBA Forms 413 7(a)/504/SBG, 413 Disaster, 413 8(a) and 413 WOSB.

*Total Estimated Annual Responses:* 371,108.

*Total Estimated Annual Hour Burden:* 391,812.

**Curtis Rich,**

*Management Analyst.*

[FR Doc. 2020–26470 Filed 11–30–20; 8:45 am]

**BILLING CODE 8026–03–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA–2020–0189]

**Qualification of Drivers; Exemption Applications; Implantable Cardioverter Defibrillator (ICD)**

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

**ACTION:** Notice of denials.

**SUMMARY:** FMCSA announces its decision to deny applications from two individuals treated with Implantable Cardioverter Defibrillators (ICDs) who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting operation of a commercial motor vehicle (CMV) in interstate commerce by persons with a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope (transient loss of consciousness), dyspnea (shortness of breath), collapse, or congestive heart failure.

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, [fmcsamedical@dot.gov](mailto:fmcsamedical@dot.gov), FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing materials in the docket, contact Dockets Operations, (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

*A. Viewing Documents and Comments*

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov/docket?D=FMCSA-2020-0087> and

choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., 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 Dockets Operations.

*B. 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](http://www.regulations.gov), as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**II. Background**

On October 8, 2020, FMCSA published a **Federal Register** notice (85 FR 21061) announcing receipt of applications from two individuals treated with ICDs and requested comments from the public. These five individuals requested an exemption from 49 CFR 391.41(b)(4) which prohibits operation of a CMV in interstate commerce by persons with a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive heart failure. The public comment period closed on November 9, 2020, and two comments were received.

FMCSA has evaluated the eligibility of these applicants and concluded that granting these two exemption requests would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(4). A summary of each applicant's medical history related to their ICD exemption request was discussed in the October 8, 2020, **Federal Register** notice and will not be repeated here.

The Agency's decision regarding these exemption applications is based on information from the Cardiovascular Medical Advisory Criteria, an April 2007, evidence report titled "Cardiovascular Disease and Commercial Motor Vehicle Driver



Safety,”<sup>1</sup> and a December 2014, focused research report titled “Implantable Cardioverter Defibrillators and the Impact of a Shock in a Patient When Deployed.” Copies of these reports are included in the docket.

FMCSA has published Medical Advisory Criteria to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.<sup>2</sup> The Medical Advisory Criteria for § 391.41(b)(4) indicates that coronary artery bypass surgery and pacemaker implantation are remedial procedures and thus, not medically disqualifying. Implantable cardioverter defibrillators are disqualifying due to risk of syncope.

### III. Discussion of Comments

FMCSA received two comments in this proceeding. One commenter was favorable towards Mr. Ronquillo continuing to drive a CMV with an ICD. The second commenter responded that FMCSA should deny granting ICD exemptions due to issues associated with public safety.

In response to the comments, FMCSA believes that a driver with an ICD is at risk for incapacitation if the device discharges. This risk is combined with the risks associated with the underlying cardiovascular condition for which the ICD was implanted either as a primary or secondary preventive measure.

### IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on an individualized assessment of each applicant's medical information, available medical and scientific data

concerning ICDs, and any relevant public comments received.

In the case of persons with ICDs, the underlying condition for which the ICD was implanted places the individual at high risk for syncope or other unpredictable events known to result in gradual or sudden incapacitation. ICDs may discharge, which could result in loss of ability to safely control a CMV. The December 2014 focused research report discussed earlier upholds the findings of the April 2007 report and indicates that the available scientific data on persons with ICDs and CMV driving does not support that persons with ICDs who operate CMVs are able to meet an equal or greater level of safety.

### V. Conclusion

The Agency has determined that the available medical and scientific literature and research provides insufficient data to enable the Agency to conclude that granting these exemptions would achieve a level of safety equivalent to, or greater than, the level of safety maintained without the exemption. Therefore, the following two applicants have been denied exemptions from the physical qualification standards in § 391.41(b)(4): Thomas O. Adams, Jr. (VA); Louis Ronquillo, (CA)

Each applicant has, prior to this notice, received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final action by the Agency. The list published today summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020-26408 Filed 11-30-20; 8:45 am]

BILLING CODE 4910-EX-P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0196]

#### Parts and Accessories Necessary for Safe Operation; Application for an Exemption From Bendix Commercial Vehicle Systems LLC

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

**ACTION:** Notice of application for exemption; request for comments.

**SUMMARY:** FMCSA requests public comment on an application for

exemption from Bendix Commercial Vehicle Systems (Bendix) to allow its advanced vehicle safety systems, which are equipped with cameras, to be mounted lower in the windshield on commercial motor vehicles than is currently permitted.

**DATES:** Comments must be received on or before December 31, 2020.

**ADDRESSES:** You may submit comments identified by Docket Number FMCSA-2020-0196 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=FMCSA-2020-0196>.

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:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

- *Fax:* (202) 493-2251.

**FOR FURTHER INFORMATION CONTACT:** Mr. José R. Cestero, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, MC-PSV, (202) 366-5541, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001. If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366-9826.

### SUPPLEMENTARY INFORMATION:

#### I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

#### Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA 2020-0196), indicate the specific section of this document to which the comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can

<sup>1</sup> The reports are available on the internet at <https://rosap.ntl.bts.gov/view/dot/16462>; <https://rosap.ntl.bts.gov/view/dot/21199>.

<sup>2</sup> These criteria may be found in 49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section D. *Cardiovascular*: § 391.41(b)(4), paragraph 4, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.



contact you if there are questions regarding your submission.

To submit your comment online, go to [www.regulations.gov/](http://www.regulations.gov/) [#!docketDetail;D=FMCSA-2020-0196](#), 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.

#### *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/> [#!docketDetail;D=FMCSA-2020-196](#) and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets 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 Dockets Operations.

#### *Privacy Act*

DOT solicits comments from the public to better inform its rulemaking process, in accordance with 5 U.S.C. 553(c). DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL 14—Federal Docket Management System), which can be reviewed at [www.transportation.gov/privacy](http://www.transportation.gov/privacy).

## **II. Legal Basis**

FMCSA has authority under 49 U.S.C. 31315(b) to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also

provide an opportunity for public comment on the request. The Agency reviews the safety analyses and the public comments and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)). If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is granted. The notice must specify the effective period of the exemption (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.315(c) and 49 CFR 381.300(b)).

#### *Bendix's Application for Exemption*

The Federal Motor Carrier Safety Regulations require devices meeting the definition of “vehicle safety technology” to be mounted (1) not more than 4 inches below the upper edge of the area swept by the windshield wipers, or (2) not more than 7 inches above the lower edge of the area swept by the windshield wipers, and outside the driver's sight lines to the road and highway signs and signals. Bendix has applied for an exemption from 49 CFR 393.60(e)(1) to allow its Bendix camera(s) with safety technologies to be mounted lower in the windshield than is currently permitted. A copy of the exemption application is included in the docket referenced at the beginning of this notice.

#### *Request for Comments*

In accordance with 49 U.S.C. 31315(b)(6), FMCSA requests public comment from all interested persons on Bendix's application for an exemption from 49 CFR 393.60(e)(1). All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested

persons should continue to examine the public docket for new material.

**Larry W. Minor,**

*Associate Administrator for Policy.*

[FR Doc. 2020-26477 Filed 11-30-20; 8:45 am]

**BILLING CODE 4910-EX-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Railroad Administration**

**[Docket No. FRA-2020-0027-N-21]**

### **Proposed Agency Information Collection Activities; Comment Request**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) abstracted below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

**DATES:** Interested persons are invited to submit comments on or before February 1, 2021.

**ADDRESSES:** Submit comments and recommendations for the proposed ICR to Ms. Hodan Wells, Information Collection Clearance Officer, at email: [hodan.wells@dot.gov](mailto:hodan.wells@dot.gov) or telephone: (202) 493-0440. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

**SUPPLEMENTARY INFORMATION:** The PRA, 44 U.S.C. 3501-3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. See 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the

methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, FRA reasons that comments received will advance three objectives: (1) Reduce reporting burdens; (2) organize information collection requirements in a “user-friendly” format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

*Title:* Federal Railroad Administration Alleged Violation and Inquiry Form.<sup>1</sup>

*OMB Control Number:* 2130–0590.

*Abstract:* The FRA Alleged Violation and Inquiry Form is a response to section 307(b) of the Rail Safety Improvement Act of 2008, which requires FRA to “provide a mechanism for the public to submit written reports of potential violations of Federal railroad safety and hazardous materials transportation laws, regulations, and orders to the Federal Railroad Administration.” The FRA Alleged Violation and Inquiry Form allows the public to submit alleged violations, complaints, or inquiries directly to FRA. The form allows FRA to collect information necessary to investigate the alleged violation, complaint, or inquiry, and to follow up with the submitting party. FRA may share the information collected with partnering State departments of transportation and law enforcement agencies.

FRA will use the information collected under the form to identify problem areas and take necessary action to prevent potential accidents of the type indicated by the information submitted from occurring.

FRA’s proposed revisions to the form include: (1) Adding several dropdown menus for form elements (*e.g.*, type, title, preferred method of contact, position, category of submission, date,

time, city, state, and entity involved) so that users can quickly provide complete contact and incident information while having to hand-enter less information; (2) adding a question requesting the users identify if they are members of the public, a railroad employee, or other; and (3) informing users that they will receive an automated response from FRA after the form is submitted. The revisions are designed to make the existing form easier to use and more understandable, and to simplify the collection of information. The revised form will ensure that users provide the necessary information so that FRA staff can review and respond more quickly. The revised form also will facilitate FRA’s ability to maintain the data collected in a more useful and uniform manner, as the new dropdown boxes will assist FRA in receiving more standardized responses.

*Type of Request:* Revision of a currently approved information collection.

*Affected Public:* Public.

*Form(s):* FRA F 6180.151.

*Respondent Universe:* Public.

*Frequency of Submission:* On occasion.

*Reporting Burden:*

| CFR section <sup>2</sup>                                          | Respondent universe | Total annual responses (forms) | Average time per response (minutes) | Total annual burden hours | Total cost equivalent <sup>3</sup> |
|-------------------------------------------------------------------|---------------------|--------------------------------|-------------------------------------|---------------------------|------------------------------------|
| Alleged Violation and Inquiry Form (Revised Form FRA F 6180.151). | Public .....        | 600                            | 7                                   | 70                        | \$1,890                            |

*Total Estimated Annual Responses:* 600.

*Total Estimated Annual Burden:* 70 hours.

*Total Estimated Annual Burden Hour Dollar Cost Equivalent:* \$1,890.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

*Authority:* 44 U.S.C. 3501–3520.

**Brett A. Jortland,**

*Deputy Chief Counsel.*

[FR Doc. 2020–26423 Filed 11–30–20; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

#### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC’s Specially Designated Nationals and Blocked Persons List (the SDN List) based on OFAC’s determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons

are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

#### FOR FURTHER INFORMATION CONTACT:

**OFAC:** Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC’s website (<https://www.treasury.gov/ofac>).

<sup>1</sup> FRA is revising the title of OMB Control Number 2130–0590 (formerly titled “Alleged Violation Reporting Form”).

<sup>2</sup> The current inventory exhibits a total burden of 48 hours while the total burden of this notice is 70

hours. The increase in the burden hours is due to changes made to the form and the expected increase in annual responses. Also, totals may not add due to rounding.

<sup>3</sup> FRA used an hourly rate of \$27 for the value of the public’s time. FRA obtained this data from the Department of Labor, Bureau of Labor Statistics.

**Notice of OFAC Actions**

On November 25, 2020, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

*Individual*

1. AL-KANI, Mohamed (a.k.a. AL-KANI, Mohamed Khalifa Abderrahim Shaqqa; a.k.a. AL-KANI, Mohammed; a.k.a. AL-KANI, Muhammad Omar), Libya; DOB 03 May 1979; nationality Libya; Gender Male; Passport F86JFJF (Libya) (individual) [GLOMAG] (Linked To: KANIYAT MILITIA).

Designated pursuant to section 1(a)(ii)(C)(1) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2018 Comp., p. 399, (E.O. 13818) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse related to his tenure.

*Entity*

1. KANIYAT MILITIA (f.k.a. "7TH BRIGADE"; a.k.a. "9TH BRIGADE"; a.k.a. "AL-KANI MILITIA"; a.k.a. "AL-KANIYAT"; a.k.a. "KANI BRIGADE"; a.k.a. "KANIAT"; a.k.a. "KANIYAT"; a.k.a. "KANYAT"; f.k.a. "TARHUNA 7TH BRIGADE"; f.k.a. "TARHUNA BRIGADE"), Libya [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

Dated: November 25, 2020.

**Andrea Gacki,**

*Director, Office of Foreign Assets Control,  
U.S. Department of the Treasury.*

[FR Doc. 2020-26507 Filed 11-30-20; 8:45 am]

**BILLING CODE 4810-AL-P**

**DEPARTMENT OF THE TREASURY****Internal Revenue Service**

**Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Adjustments to Basis of Stock and Indebtedness and Treatment of Distributions**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden related to adjustments to basis of stock and indebtedness to shareholders of S corporations and treatment of distributions by S corporations to shareholders.

**DATES:** Written comments should be received on or before February 1, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

**SUPPLEMENTARY INFORMATION:**

*Title:* Adjustments to Basis of Stock and Indebtedness to Shareholders of S Corporations and Treatment of Distributions by S Corporations to Shareholders.

*OMB Number:* 1545-1139.

*Regulation Project Number:* TD 8852.

*Abstract:* This document contains final regulations relating to the passthrough of items of an S corporation to its shareholders, the adjustments to the basis of stock of the shareholders, and the treatment of distributions by an S corporation. Changes to the applicable law were made by the Subchapter S Revision Act of 1982, the Tax Reform Act of 1984, the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, and the Small Business Job Protection Act of 1996. These regulations provide the public with guidance needed to comply with the applicable law and will affect S corporations and their shareholders.

*Current Actions:* There is no change to the burden previously approved.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations and Individuals.

*Estimated Number of Responses:* 2,250.

*Estimated Time per Respondent:* 12 min.

*Estimated Total Annual Burden Hours:* 450.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: November 25, 2020.

**Ronald J. Durbala,**  
*IRS Tax Analyst.*

[FR Doc. 2020-26455 Filed 11-30-20; 8:45 am]

**BILLING CODE 4830-01-P**

**DEPARTMENT OF THE TREASURY****Internal Revenue Service**

**Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Form 5308**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden associated with Form 5308, *Request for Change in Plan/Trust Year*.

**DATES:** Written comments should be received on or before February 1, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to Ronald J. Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

**SUPPLEMENTARY INFORMATION:** *Title:* Request for Change in Plan/Trust Year (Form 5308).

*OMB Number:* 1545–0201.

*Regulation Project Number:* Form 5308.

*Abstract:* Form 5308 is used to request permission to change the plan or trust year for a pension benefit plan. The information submitted is used in determining whether IRS should grant permission for the change.

*Current Actions:* There are no changes to the burden previously approved by OMB. This submission is for renewal purposes.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 20.

*Estimated Time per Respondent:* 42 min.

*Estimated Total Annual Burden Hours:* 14.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: November 24, 2020.

**Ronald J. Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2020–26392 Filed 11–30–20; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Mortgage Credit Certificates (MCCs)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the application process for determination of employee stock ownership plans.

**DATES:** Written comments should be received on or before February 1, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

#### SUPPLEMENTARY INFORMATION:

*Title:* Mortgage Credit Certificates (MCCs).

*OMB Number:* 1545–0922.

*Regulation Project Number:* Form 8329 and Form 8330.

*Abstract:* Mortgage Credit Certificates provide qualified holders of the certificates with a credit against income tax liability. In general, an Issuer elects to establish a mortgage credit certificate program in lieu of issuing qualified mortgage revenue bonds. Section 25 of the Code permits states and political subdivisions to elect to issue Mortgage Credit Certificates in lieu of qualified mortgage revenue bonds. Form 8329 is used by lending institutions and Form 8330 is used by state and local governments to provide the IRS with information on the issuance of mortgage credit certificates (MCCs) authorized under Internal Revenue Code section 25. IRS matches the information supplied by lenders and issuers to ensure that the credit is computed properly.

*Current Actions:* There is no change to the burden previously approved.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* Form 8329—10,000; Form 8330—2,000.

*Estimated Time per Respondent:* Form 8329—5 hrs. 53 min.; Form 8330—7 hrs. 28 min.

*Estimated Total Annual Burden Hours:* Form 8329—58,800; Form 8330—14,920.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are

confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: November 25, 2020.

**Ronald J. Durbala,**  
IRS Tax Analyst.

[FR Doc. 2020-26456 Filed 11-30-20; 8:45 am]

BILLING CODE 4830-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Form CT-1 and CT-1 X

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden associated with Form CT-1, *Employer's Annual Railroad Retirement*

*Tax Return* and Form CT-1 X, *Adjusted Employer's Annual Railroad Retirement Tax Return or Claim for Refund*.

**DATES:** Written comments should be received on or before February 1, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to Ronald J. Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

#### SUPPLEMENTARY INFORMATION:

*Title:* Railroad Retirement Tax Act (Form CT-1 and CT-1X).

*OMB Number:* 1545-0001.

*Regulation Project Number:* Form CT-1 and Form CT-1 X.

*Abstract:* Railroad employers are required to file an annual return to report employer and employee Railroad Retirement Tax Act (RRTA) taxes. Form CT-1 is used for this purpose. The IRS uses the information to ensure that the employer has paid the correct tax. Form CT-1X is used to correct previously filed Forms CT-1.

*Current Actions:* We have significantly revised the 2020 Form CT-1 to allow for the reporting of new employment tax credits and the deferral of deposit and payment of certain taxes from the following provisions.

- Public Law 116-127: Section 7001, Payroll credit for required paid sick leave; Section 7003, Payroll credit for required family leave; and Section 7005, Wages paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act not considered compensation under section 3221(a)

- Public Law 116-136: Section 2301 Employee Retention Credit; and Section 2302, Delay of payment for employer payroll taxes.

The changes to Form CT-1 will result in an estimated burden increase of 5,985 hours. This submission is for renewal purposes.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Businesses or other for-profit organizations, not-for-profit institutions, and state, local or tribal governments.

*Estimated Number of Respondents:* 2,400.

*Estimated Time per Respondent:* 18 hrs., 56 min.

*Estimated Total Annual Burden Hours:* 45,440.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: November 24, 2020.

**Ronald J. Durbala,**  
IRS Tax Analyst.

[FR Doc. 2020-26393 Filed 11-30-20; 8:45 am]

BILLING CODE 4830-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Form 2678

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden associated with Form 2678, *Employer/Payer Appointment of Agent*.

**DATES:** Written comments should be received on or before February 1, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to Ronald J. Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

**SUPPLEMENTARY INFORMATION:**

*Title:* Employer/Payer Appointment of Agent (Form 2678).

*OMB Number:* 1545-0748.

*Regulation Project Number:* Form 2678.

*Abstract:* Internal Revenue Code section 3504 authorizes a fiduciary, agent or other person to perform acts of an employer for purposes of employment taxes. Form 2678 is used to empower an agent with the

responsibility and liability of collecting and paying the employment taxes including backup withholding and filing the appropriate tax return.

*Current Actions:* There are no changes to the burden previously approved by OMB. This submission is for renewal purposes.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses or other for-profit organizations, not-for-profit institutions, farms and the Federal Government.

*Estimated Number of Respondents:* 6,130,000.

*Estimated Time per Respondent:* 2 hrs., 14 min.

*Estimated Total Annual Burden Hours:* 13,731,200.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Desired Focus of Comments: The Internal Revenue Service (IRS) is

particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: November 24, 2020.

**Ronald J. Durbala,**  
*IRS Tax Analyst.*

[FR Doc. 2020-26496 Filed 11-30-20; 8:45 am]

**BILLING CODE 4830-01-P**

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When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

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